Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THERESA B. BRADLEY
Petitioner,

v.

ADAM STEPHEN DONER
DAVIS, GORDON, DONER & CHANDLER, PA
JOHN WILLIAM CARROLL
JOHN WILLIAM CARROLL, PA
Respondents,

On Petition for Writ Of Certiorari
To the Fourth District Court of Appeal
15th Judicial Circuit Court West Palm Beach, FL
and Florida Supreme Court

Theresa Bradley, Pro Se
Petitioner
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85 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER Petitioner is required to ignore the Federal Arbitration Act U.S.C. 9 §§1-14, particularly U.S.C.9§10 "Same; vacation; grounds, rehearing" to expend over $200,000 and several additional years for a securities appellate attorney to "miraculously" cure her attorneys prior 24-month negligent pre-trial conduct by their failure to abide by the NASD Code of Arbitration Procedure, failure to respond to eight (8) motions regarding matters previously ruled upon in a prior venue?

2. WHETHER defendants who file a Motion for Summary Judgment in State of Florida Court pursuant to Fla.R.Civ.Procedure Rule 1.510 should be entitled to judgment as a matter of law resulting in dismissal as a result of Petitioner's response without affidavits (Rule 1.510 (a)), Defendants' affiants' "crystal ball gazing" conjecture of the likelihood of unknown future events yet to take place combined with their affiants' utter disregard to the NASD Arbitration Code of Procedure governing pre-trial matters under NASD Code of Arbitration Procedure §10321 "Documents/Discovery Exchange Hearing" limiting time period of production of documents, thus closing discovery matters July 25, 1995 at NASD Atlanta venue prior to transfer into NASD South Florida?

3. WHETHER Petitioner's rights to due process accorded by the U.S. Constitution XIV Amendment were deprived by the Fourth District Court by its Denial of Petitioner's Request to Invoke the Discretionary Review of the Supreme Court of the State of Florida as required under Fla.Appellate Procedure Rule 9.030 "Discretionary Jurisdiction " the decision of the 4th District Court was in direct contradiction of the Florida Supreme Court commanding only criminal cases that absolutely required appellate review, despite the fact the case

was of great public importance, and there were no controlling precedents in the Supreme Court of Florida.

4. WHETHER the Court in Florida denied to the Petitioner and violated the "Equal Protection Clause" of the U.S. Constitution XIV Amendment by requiring the Petitioner to disregard the Federal Arbitration Act U.S.C. 9§10, thus requiring litigants in ONLY professional negligence/legal malpractice actions to ignore the egregious 24-month's legal malpractice (failure to respond to standard pre-trial motions already ruled upon in prior venue) by the Court's absolute requirement that all litigants in legal malpractice actions ONLY obtain appellate review with utter disregard to the Florida Supreme Court ruling that clearly established that only criminal cases absolutely require appellate review?

5. WHETHER the Court in Florida violated Petitioner's rights to due process when it ignored the NASD Code of Arbitration Procedure and pre-arbitration matters in a prior venue transferring in with the case, including limitation of Documents/Discovery matters pursuant to NASD Code §10321?

6. WHETHER, the Court in Florida ignored that the Florida Supreme Court set forth that the only Florida case that absolutely requires appellate review, a bright line standard in Florida cases, is the criminal that absolutely requires post-conviction relief prior to initiating and maintaining a cause of action for professional negligence and legal malpractice?

7. WHETHER the State Court in Florida exceeded their authority or has the judicial power to modify the Federal Arbitration Act Title 9 U.S.C. §§1-14 enacted by Congress July 1947, c. 392§1, 61 Stat. 669 and **ABSOLUTELY REQUIRE AND MAKE** a civil litigant appeal an arbitration award prior to initiating and maintaining a professional negligence/legal malpractice action when the client evaluated the underlying NASD case file, utilized reasonable evaluation that 2-years of unanswered motions resulted in dismissal and determined there were none of the 5-grounds to appeal or vacate an award?

PARTIES TO THE PROCEEDINGS

The Petitioner in this action is

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Sandersville, GA 31082

The respondents in the action are

Legal Counsel for Respondent Doner et al
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West Palm Beach, FL 33401;

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Charbonneau v. Morese Operations 727 So. 2d 1017 4 DCA
Cleveland v. Porca Co., 38 F3d 289 (7th Cir. 1994)
CSX Transp. b. Pasco County 660, So. 2d 757 (Fla. Dist. Ct. App. 1995)
Eastman v. Flor-Ohio 744 So. 2d (Fla. App. 5 Dist. 1999)
Ferrari v. Vining 744 So. 2d 480
Fla. R. Appellate Procedure Rule 9.030" Jurisdiction of the Fla. Supreme Court
Gaines v. Hauton, 645 F.2d 761 (9th Cir. 1981)
Holt v. Talcot, Fla. 191 So. 2d 40
Hunzinger v. Quarles & Brady, 735 So. 2d 598 (Fla. App. 4 Dist. 1999)
Kroog v. ait, 712 F. 2d 1148 (7th Cir. 1983)
Masson v. New Yorker Magazine, Inc. 501 U.S. 496 (1991)
Okun v. Litwin Securities, Inc. 619 So. 2d 995 (Fla. App. 3 Dist, 1993)
Pennsylvania Ins. Guar. Assn. v. Sikes, 590 So. 2d 1051 (Fla. 3d DCA 1991)
Park v. First Union Brokerage Services, Inc. 926 F. Supp. 1085, 1088 (MD Fla. 1996)
Romans v. Haymes 676 So. 2d 505 (Fla. App. 1 Dist 1996)
Segall v. Segall 632 So. 2d 76 (Fla. App 3 DCA 1993)
Silverstone v. Edell 721 So. 2d 1173, 1175, Fla. 1998
Steel v. Kehoe, 747 So. 2d 931 (Fla. 1998)
Taracido v. Perez-Abeu, 705 So. 2d 41 3rd DCA 1997
Toyota of Berkeley v. Local 1095, 834, F. 2d 751 (9th Cir. 1987)
Verzura Construction Inc. v. Surfside Ocean 708 So. 2d 994 (3DCA 1998)

Statutes and Codes of Procedures

Federal Arbitration Act Title 9 USC Sections 10
Federal Arbitration Act Title 9 USC Sections 1-14
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NASD Dispute Resolution, Inc. Code of Arbitration Procedure
U.S. Constitution XIV Amendment

PETITION FOR WRIT OF CERTIORARI

Petitioner, Theresa B. Bradley, requests that a writ of certiorari issue to review the judgment of the 15th Judicial Circuit Court, West Palm Beach, Florida Case No. 98-11183-AJ, Affirmation of Judgment at the Fourth District Court of Appeal Case No. 4D00-1765, Denial to Invoke the Discretionary Review of the Florida Supreme Court issued by the Fourth District Court of Appeal April 4, 2001, and Dismissal at the Florida Supreme Court Case No. SC 01-519 August 20, 2001 in Theresa B. Bradley v. Adam Stephen Doner; Davis, Gordon, Doner & Chandler, PA; John William Carroll; John William Carroll, PA

JURISDICTION

The Final Judgment of the 15th Judicial Circuit Court was entered on May 15, 2000; the Affirmation of Judgment by the Fourth District Court of Appeal was entered on February 21, 2001; the Denial to Invoke the Jurisdiction of the Supreme Court of the State of Florida was entered by the Fourth District Court of Appeal on April 4, 2001; and the dismissal by the Supreme Court of the State of Florida was entered on August 20, 2001 despite notification by the Petitioner to the Florida Supreme Court that she had received no mail whatsoever from the Supreme Court of Florida, including the August 20, 2001 dismissal — all with utter disregard to the Petitioner's valid grounds to appeal the matter to the higher tribunal.

This Petition is filed within the time period allowed by this Court. The jurisdiction of this Court is invoked under 28 U.S.C.A.§§1254, 1257; US Supreme Court Rules 10 ET. Seq.

CONSTITUTIONAL, CASE AND STATUTORY PROVISIONS

This case involves U.S.C. 9 §§ 1-14, and particularly §10 which defines the limited five grounds to appeal or vacate an arbitration award upon application to a State or Federal Court, as follows: "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. July 30, 1947, c. 392, 61 Stat. 672.

This case involves the NASD Dispute Resolution Code of Arbitration Procedure, particularly NASD Code Section 10321 "Documents/Discovery Exchange Hearing" limiting the time period for the litigants to make and complete discovery requests (30 days) and file any objections thereto (10 days), which is set forth in NASD Code of Arbitration Procedure Code §10321.

This case involves violation by the Florida Courts of the United States Constitutional doctrine of "equal protection under the law" XIV Amendment by the Florida Court's absolute requirement that civil litigants in PROFESSIONAL NEGLIGENCE-LEGAL

MALPRACTICE CASES ONLY cure their attorneys' 2-years of professional negligence and failure to respond to eight (8) Motions to Dismiss already ruled upon in a prior venue and obtain appellate relief with utter disregard to the limitations set forth in five limited grounds to appeal or vacate an arbitration award.

This case involves the Florida Court's disregard to the legal malpractice (failure by Petitioner's attorneys to respond in a second venue to matters already concluded in a prior venue for a period of 24 months) concerning 8-abusive discovery motions filed in violation of the NASD Code of Arbitration Procedure §10321.

This case involves a securities arbitration matter filed in NASD Atlanta venue with all pre-trial matters concluded. Thereafter, the case was transferred for Final Hearing only into a second venue, NASD South Florida where the defendants in that underlying action began on a path of abusive discovery re-presenting the exact same motions already ruled upon in a prior venue without Petitioner's attorneys in the second venue responding to the redundant and abusive motions for a period of 2 years resulting in a dismissal with prejudice of Petitioner's arbitration case.

This case involves egregious negligence and malpractice by Petitioner's attorneys for 2-years being "magically transformed" in this legal malpractice action as "arbitrator error" when, in fact, it was attorney negligence and malpractice that resulted in the dismissal with prejudice, not arbitrator error.

This case involves the fact that Petitioner had none of the five limited grounds to appeal or vacate an arbitration award USC9§10, which attorney negligence and malpractice has been capriciously placed as error by the arbitrators despite the fact that 2-years of 8-unanswered motions are contained in the securities case file that led to the dismissal with prejudice by the arbitration panel.

This case involves the Courts in Florida utter disregard of the NASD Code of Arbitration Procedure governing the time period of pre-trial arbitration matters in Petitioner's underlying case as the NASD Code of Arbitration Procedure timing of events related to facts of Petitioner's legal malpractice action due to her attorneys failure for 2-years to respond to 8-motions regarding matters already ruled in a prior venue.

This case involves the Florida Court's disregard of Petitioner's attorneys legal malpractice — the January 1996 to January 1998 abusive discovery requests (8 motions re-presented in the new venue) unanswered by Petitioner's attorneys for 2-years resulting in a "14 year discovery sanction" entered June 16, 1997 by the NASD that resulted in the "lesser sanctions" which was required prior to the NASD Dismissal with Prejudice under NASD Code Section 10305.

This case involves the Florida Court's utter disregard to litigants in legal malpractice actions by requiring the injured party (client) to "cure their attorneys" negligence prior to initiating or maintaining a legal malpractice action in the State of Florida, unlike any other professional negligence action in the State of Florida.

STATEMENT OF THE CASE

I. Brief History of Underlying Securities Case NASD 94-04479

October 26, 1994 Petitioner files NASD Claim for Arbitration at NASD Dispute Resolution, Inc. Theresa B. Leach v. Dean Witter, et al NASD Case No. 94-04479 regarding violations of Securities & Exchange Act 1934 10(b)(5) by Dean Witter et al account opening February 24, 1992 to October 16, 1992 the date of account closing.

June 1995 Dean Witter requests Plaintiff's Documents dated 1987 through 1995, three years beyond the closing of the Dean Witter account.

July 25, 1995 pursuant to NASD Code Section 10321 "Documents/ Discovery Exchange Hearing" upon the Petitioner filing her Objections to Documents Requests/Objections to the Time Period for Document Production beyond October 1992 with Memorandum of Law in Support to limit document production and third-party subpoenas to relevant time period of the case, i.e., 1987 to 1992, NASD Atlanta Chairman Keith Logue, Esq. closes discovery and limits production of documents by the parties and by third party subpoena to the relevant time period of the case, January 1987 to November 31, 1992, executes third party subpoenas with November 31, 1992 as discovery cut-off date.

July 25, 1995 to August 4, 1995 - 10-day period for Dean Witter to file objections to November 31, 1992 time period cut-off pursuant to NASD Documents/Discovery 10321 procedure providing 10-days to file objections — DEAN WITTER FILES NO OBJECTIONS.

August 4, 1995 DOCUMENTS/DISCOVERY CLOSED with time period limitation of November 31, 1992. The NASD Code of Arbitration Procedure §10321 is clear in that the parties had 10-days subsequent to July 25, 1995 to file objections to the time limitation of discovery set forth by the NASD Chairman after motions, memorandum of law, objections were filed.

November 1995 Final Hearing date at NASD Atlanta canceled by Dean Witter remittance of $750.00 fee to NASD.

January 1996 NASD Atlanta Final Hearing second cancellation by Dean Witter with remittance of $750.00 cancellation fee.

January 1996 Change of Venue to South Florida for Final Hearing as majority of witnesses in South Florida granted by NASD Arbitration Panel. Final Hearing site moved to NASD South Florida with Final Hearing re-set June 24, 1997.

January 1996 to January 1998 - Dean Witter begins on path of abusive discovery requests ignoring prior venue order and NASD Code of Arbitration Procedure limiting time period to file objections by re-presenting eight(8) Motions to Dismiss and Requests for Documents dated 1993, 1994, 1995, 1996, 1997 already limited by July 25, 1995 NASD Ruling limiting document production to relevant time period of securities case, i.e., November 31, 1992.

January 1996 to January 1998 - Eight (8) Motions to Dismiss and Motions for Request for Documents unanswered by Petitioner's attorneys in South Florida NASD second venue leads to dismissal with prejudice of case.

April 1997, Dean Witter ignores prior third-party subpoena November 31, 1992 cut-off and begins sending subpoenas to third parties (Petitioner's Bank and Brokerage Accounts) for Petitioner's documents 1987 to 1997, five years beyond the prior November 1992 discovery cut-off as a result of Documents/Discovery Hearing under NASD Code 10321 — all ignored by Petitioner's legal counsel who failed to respond and stop abusive discovery.

June 16, 1997 NASD South Florida enters 14-year documents/ discovery sanction imposed upon Petitioner as a result of her attorneys failure to respond to Motions to Produce Documents already ruled upon with prior cut-off ruling NASD Atlanta Chairman Logue July 25, 1995.

January 1996 to January 1998, Dean Witter begins on path of abusive discovery filing motions for production of documents dated beyond the November 31, 1992 time period cut-off ruling entered by NASD Chairman Keith Logue, Esq. July 25, 1995 — eight (8) motions presented left unanswered for 24 months by Petitioner's South Florida legal counsel, as follows:

Defendant Scot Warfman failure to respond to abusive pre-trial motions: April 22, 1996, October 24, 1996, October 31, 1996, May 22, 1997, May 30, 1997.

Defendant Adam Stephen Doner Davis, Gordon, Doner & Chandler, PA failure to respond to September 12, 1997 Motion to Dismiss Under NASD Code Section 10319

Defendant John William Carroll, et al failure to respond to Motions to Dismiss dated November 11, 1997 and at Hearing January 7, 1998 convened to dismiss Petitioner's case pending for 4-years under NASD Code Section 10305 Dismissal with Prejudice.

January 7, 1998 to February 24, 1999 NASD affirms at Broward County Circuit Court that Petitioner's case pending 4-years in two separate venues with three prior Final Hearing date cancellations is Dismissed with Prejudice under both NASD Code § 10305 and NASD § 10319.

Petitioner obtains NASD NO. 94-04479 case file to discover 2-years of eight (8) unanswered motions, June 16, 1997 14-year documents/discovery sanction (9 years prior to opening Dean Witter account/5-years subsequent to closing Dean Witter account) imposed by NASD Panel on June 16, 1997 as a result of her attorneys failure to respond to discovery motions represented in second venue NASD South Florida already ruled upon in prior NASD Atlanta venue and initiates professional negligence/legal malpractice action against her attorneys.

II. LEGAL ARGUMENTS

Respondents/Defendants/Attorneys were not entitled to summary judgment as a matter of law at the 15th Judicial Circuit Court as there were numerous genuine issues in dispute for trial on the merits.

Respondents/Defendants/Attorneys were not entitled to affirmation of summary judgment at the 4th District Court as the NASD Panel that Dismissed her case with prejudice January 7, 1998 with affirmation of dismissal with prejudice February24, 1999 had imposed the "lesser sanction" required under NASD Code Section 10305 on June 16, 1997 when it entered a "discovery sanction" well-outside of the time period of entering Discovery Order that required that the Petitioner produce documents 9-years prior to the February 24, 1992 opening of her Dean Witter account and 5-years subsequent to the October 16, 1992 closing of the Dean Witter account.

On June 16, 1997 the South Flordia Panel entered this contradictory "discovery sanction, " in direct contradiction to the NASD Discovery Limitation November 31, 1992 Order by NASD Chairman Logue, as a result of her attorneys failure to respond to motions regarding matters already ruled upon. And, the Dismissal with Prejudice January 7, 1998/affirmation February 24, 1999 as a result of her attorneys further failure to respond subsequent to the June 16, 1997 "discovery sanction order" on September 12, 1997 when presented with a Motion to Dismiss, on November 11, 1997 when presented with a Motion to Dismiss, and AGAIN on January 7, 1998 at Hearing when Petitioner's response to Motion to Dismiss with Prejudice for failure to produce documents, in fact already produced July 1995, was ' I DON'T KNOW."

Respondents were not entitled to summary judgment as a matter of law with these numerous and genuine material facts in dispute as required under Florida Law — Florida Rule of Civil Procedure Rule 1.530 "Summary Judgment."

Respondents were not entitled to summary judgment as their "expert" affidavits presented at the summary judgment hearing totally ignored the NASD Code of Arbitration Procedure time period of events in Petitioner's securities case and the affidavits contained inadmissable future conjecture as to the likelihood of unknown future events that failed to consider the

June 16, 1997 non-monetary lesser sanction "contradictory 14-year documents/discovery order." The affiants completely ignored the NASD Code of Arbitration Procedure, particularly NASD Code Section 10321 "Documents/Discovery Exchange Hearing" limiting the time period to make and complete discovery requests thirty (30) days with ten (10) days for the parties to file objections to NASD rulings (July 25, 1995), not 24-months later with eight (8) unanswered motions confusing the second venue NASD Panel.

Unknown, future and conjectural assumptions are not admissable affidavits under summary judgment hearings. Affiants statements of opinion as to the likelihood of unknown future events are not sufficient to support Respondents Motion for Summary Judgment, which precludes the Court from entering summary judgment as a matter of law — See Cleveland v. Porca Co., 38 F3d 289 (7th Cir. 1994).

Petitioner has the legal right to evaluate the entire NASD No. 94-04479 Case file to ascertain why her legal rights to binding arbitration were dismissed with prejudice to determine whether or not she had the grounds to appeal or vacate the arbitration award. Upon Petitioner's discovery that eight (8) motions regarding matters already ruled upon in a prior venue were left unanswered in the second South Florida venue due to attorney negligence and failure to uphold the standard of care to protect their client, there were none of the limited 5-grounds to appeal or vacate the arbitration award. A client is not absolutely required to proceed with a meritless appeal due to attorney negligence and legal malpractice. A client is not required to "cure their attorneys" negligence and legal malpractice prior to initiating and maintaining a cause of action for professional negligence and legal malpractice.

Petitioner had no grounds under the Federal Arbitration Act to appeal the dismissal with prejudice entered by the NASD Panel February 24, 1999 regarding events already 7-13 years "stale" at the date of affirmation of dismissal. Petitioner discovered her attorneys January 1996 to January 1998 negligence and failure to

respond for 24 months to eight (8) unanswered motions resulting in both the June 16, 1997 14 year discovery sanction imposed by the NASD South Florida Panel, the September 12, 1997 Motion to Dismiss left unanswered by Defendant Doner, the November 11, 1997 unanswered Motion to Dismiss presented to Defendant Carroll, and at the the January 7, 1998 Motion to Dismiss with Prejudice Hearing the NASD Panel asked a legitimate question to Defendant Carroll, "Did she (his client) produce the documents?" Defendant Carrolls' Response: "I don't know." John Carroll January 7, 1998 NASD Pre-Trial Hearing.

Respondents in this case have utilized as their defensive strategy that the NASD Panel erred when the case file is replete with eight (8) unanswered motions in the second venue left unanswered. The Defendants have used the strategy to shift the blame for the dismissal with prejudice from themselves and their own negligence for 2-years to respond to one of eight motions to dismiss to blame the South Florida NASD Panel newly convened June 1997 for Final Hearing set June 24, 1997. The NASD South Florida Panel did not commit error, the Respondents/Attorneys failed to respond to one of eight motions presented for 24 months prior to the NASD Panel convening for Final Hearing June 24, 1997 and for a six-month period thereafter by the attorneys failure to respond to motions presented Septembe 12, 1997 (Doner Motion), November 11, 1997 (Carroll Motion) and at Hearing January 8, 1998 (Carroll Motion).

The NASD Code of Arbitration Procedure is crystal clear as to discovery time periods under NASD Code §10321, which absolutely requires that the parties have a 30-day time period to file their response and/or objections to documents requests, including third-party subpoenas — NOT 24 MONTHS! And, the NASD Code§10321 is perfectly clear that objections to a ruling must be filed within 10 days of the entry (July 25, 1995) — NOT 24 MONTHS. Had Petitioner's attorneys filed a response to abusive discovery requests in the second venue and informed the newly convened NASD Panel that Petitioner had complied with document

production and that the first venue NASD Chairman had limited document production to November 31, 1992, the case would have proceeded to Final Hearing. All that was required was for one of the Defendants for a 2-year period to provide Notification of Documents Production and Compliance with July 25, 1995 Production Order to the second venue NASD Panel in order to proceed to Final Hearing at the NASD. As a result of their failure to respond, answer any motion, or respond intelligently at January 7, 1998 hearing with the NASD panel, the case would have proceeded to Final Hearing January 24, 1998. When asked: "Did she produce documents" and the attorney responds "I DON'T KNOW" the panel dismissed the case with prejudice due to the gross incompetence, negligence, failure to uphold the standard and duty of care to their client to prepare for a Motion to Dismiss with Prejudice Hearing. The blame lies with the attorneys and the case file is full of eight (8) unanswered motions and one June 16, 1997 "14 year lesser sanction" as required under a dismissal with prejudice.

The facts in this case are simple — the attorneys failed to file responses for 24 months to eight abusive discovery motions and failed to require that the parties uphold the NASD Code of Arbitration Procedure, thus the attorneys failure led to a June 16, 1997 onerous 14-year discovery sanction entered by the NASD South Florida in complete oblivion due to her attorneys failure to respond to a Motion for 2-years regarding the fact that the Petitioner had produced all documents for the case and that discovery limitations had been properly imposed upon the parties by NASD Chairman Logue July 25, 1995 when he entered the order that "No parties are to provide documents dated beyond November 31, 1992" executing the third-party subpoenas with the November 31, 1992 cut-off date.

The Court in Florida erred in its dismissal and affirmation of dismissal under summary judgment as it failed to consider the NASD Code of Arbitration Procedure, the facts in the case file concerning events at NASD Atlanta Octobe4 24, 1994 to January 1996, and the abusive discovery as a result of the January 1996 to January 1998 eight (8) unanswered motions, combined with the

June 16, 1997 "discovery sanction" imposed 24 months beyond the close of discovery under NASD Code §10321, as no Court could possibly pour through a 4-year, 2-venue, 4,000 page arbitration case file to discern the June 16, 1997 "lesser sanction" required to dismiss a case under NASD Code §10305.

The Court failed to consider the fact that the Petitioner had financial damages due to expenditures for 4-years and $40,000 to bring her case to the NASD for "quick, efficient, inexpensive binding arbitration." And, the Court failed to consider that BUT FOR HER ATTORNEYS failure to notify the new South Florida Panel of documents/discovery compliance and documents/ discovery ruling transferring into the new venue with the case file, the Petitioner could attend the Final Hearing June - January 1998, BUT FOR HER ATTORNEYS NEGLIGENCE IN THESE PRE-TRIAL MATTERS.

By affirming the summary judgment dismissal of her legal malpractice action, the Florida Court has absolutely required that a litigant in a legal malpractice action "cure her attorneys' negligence" before initiating and maintaining a cause of action in the State of Florida "Professional Negligence/Legal Malpractice." And, in the current case, the Petitioner had the burden to totally ignore the Federal Arbitration Act U.S.C.9 §10 to proceed to appeal a meritless and groundless appellate review at her own expense, in this instance $200,000 for a securities appellate attorney to rectify the professional negligence over 24-months by her prior attorney.

In fact, the Florida Court has required that a securities litigant ignore the negligence by her attorneys, ignore the limited grounds to vacate an arbitration award, hire another attorney at $200,000 to protect you from the $40,000 in damages sustained as a result of your prior attorneys' negligence to bring their client to a QUICK, SIMPLE, EFFICIENT FINAL HEARING, obtain a new Judge to review a 4-year case file, 4,000 page case file, locate what went wrong, and miraculously come up with a "cure for legal

malpractice" at the client's expense — LEGAL ABUSRDITY and LEGAL HIGHWAY ROBBERY FOR THE ATTORNEYS IN SOUTH FLORIDA, all to the financial detriment for the client.

To impose this burden upon a litigant — to cure their attorneys' negligence/malpractice — makes the profession of "attorney" in the State of Florida, as it relates to all other likewise equally educated professionals with several years higher professional education beyond a bachelor's degree, conducting business with the public in Florida, i.e., medical doctors, engineers, accountants, dentists, psychologists, etc., as some separate, unequal, higher legal status class of professionals known as "attorneys at law" in Florida bestowed upon them by their "brethren former attorney/peers," now Judges in the Courts in the State of Florida.

For the Florida Courts to bestow this "superior, unequal, special class to attorneys in professional negligence/legal malpractice actions" is a violation of the 14th Amendment to the Constitution "equal protection clause" as it relates to equally educated professionals conducting business with the public in Palm Beach County, Florida.

The Florida Court in Petitioner's case conveniently failed to acknowledge or recognize the procedural limitations imposed by the NASD Code of Arbitration Procedure guidelines for securities cases as it related to the facts in Petitioner's underlying securities case. And, the Florida Court failed to recognize that Petitioner had no valid grounds to appeal the dismissal with prejudice as the "reviewing court may not comb through the record of arbitration proceedings, in this case 4-years, 2-venues, 4,000 pages of securities case file. The Circuit Court and the District Court failed to recognize that Petitioner had no grounds to appeal the dismissal with prejudice and that the *"reviewing court may not comb through the record of arbitration proceedings for errors of fact or law inherent in the decision-making process" — See Boyham v. Maguire 693 So. 2d 659 (Fla. App 4 Dist 1997). Cassedy v. Merrill*

Lynch, 751 So 2d 143 Fla. 1 Dist 2000. Furthermore, the Courts in Florida have ignored that *"Awards made by arbitration panels cannot be set aside for mere errors of judgment either as to law or as to facts. If arbitration award is within scope of submission, and arbitrators are not guilty of acts of misconduct set forth in statute, arbitration award operates as a final and conclusive judgment." — See Veruzura Construction Inc. v. Surfside Ocean 708 So. 2d 994 (3rd DCA 1998)*

For the District Court to have expected a Broward County judge to review a 4-year, 2-venue, 4,000 page NASD case with 3-Final Hearing prior cancellations and conclude that the attorneys' failure to respond to one of eight motions re-presented in a second venue for a 2-year period, left unanswered by the attorneys, combined with a June 16, 1996 14-year non-monetary discovery sanction imposed upon their client due to the attorneys' negligence in direct contraction to the NASD Code §10321 as a result of attorney negligence was arbitrator error is SHEER LEGAL ABSURDITY. It is the responsibility of the attorneys to inform the NASD Panel newly convened in the case as to prior venue rulings that their client has complied with document requests in light of the NASD Chairman ruling limiting document production to the relevant time period of the case. It is not incumbent upon the NASD Panel convened to figure it out with complete silence to Motions to Dismiss rampant for 2-years in the case file.

The Florida Court ignored that the only judicial case that absolutely requires appellate or post conviction relief in the State of Florida as a condition to bringing and maintaining a legal malpractice cause of action by a client, A BRIGHT LINE RULE referred to by the 15th Judicial Circuit Court Judge dismissing Petitioner's valid claim for damages. The Florida Court ignored that the Florida Supreme Court held and absolutely required that a convicted criminal defendant MUST OBTAIN APPELLATE or post conviction appellate review as a pre-condition to initiating and maintaining a legal malpractice action in the State of Florida. There are no other types of cases, except CRIMINAL, that

absolutely require appellate review. Hence the argument by the Florida Court that the petitioner abandoned her appeal by not pursuing post-dismissal with prejudice relief in her civil action when she discovered her attorneys negligence and failure to respond 2-years to 8-motions, is not a valid or legal reason to capriciously apply a "bright-line" standard to Petitioner's case governed by the Federal Arbitration Action U.S.C. 9§10 as this case is NOT CRIMINAL AND DOES NOT ABSOLUTELY REQUIRE THE BRIGHT LINE STANDARD OF POST - DISMISSAL WITH PREJUDICE RELIEF as stated by the Court in its dismissal under defendants motion for summary judgment.

The Florida Court ignored and failed to consider that on June 16, 1997 a 14 -year discovery sanction order was imposed upon the Petitioner in direct contradiction to a prior discovery order imposing limitations for document production to the relevant time period of the case. The Florida Court ignored the NASD Code of Arbitration Procedure as it related to the facts in Petitioner's underlying case. And, the Florida Court ignored that subsequent to the June 16, 1997 "discovery sanction" constituting the lesser sanction required prior to dismissal with prejudice, that on two later occasions, Petitioner's attorneys failed to respond to two extremely important Motions to Dismiss with Prejudice dated September 12, 1997, November 11, 1997 and the "I DON' T KNOW" by Petitioner's attorney at the Dismissal with Prejudice Hearing convened at Petitioner's expense that resulted in the dismissal with prejudice due to her attorneys' negligence, not arbitrator error.

III CONCLUSION WITH REASONS FOR GRANTING THE PETITION

The Florida Court has erred in the dismissal under summary judgment as the Petitioner had no grounds to appeal or vacate the arbitration award under U.S.C.9 §10. Legal malpractice and failure to uphold their duty and standard of care to respond in a 2-year period to 8-motions and prepare for hearing on dismissal

with prejudice or respond at hearing with "I DON'T KNOW" when asked, "Did your client produce documents?" is not arbitrator error. It is legal malpractice, negligence and failure to uphold a basic standard and duty to a client — respond to 8-motions, prepare for a hearing or advise your client of the motions in order that the client can protect themselves.

The Florida Court erred in that the "expert affidavits" presented at summary judgment hearing contained "crystal ball gazing or Fortune Teller's Error" as to the likelihood of future events, which is not sufficient to support any respondents motion for summary judgment in any court of law in the United States. Defendants affiants cannot predict the future and cannot impose upon an appellate judge the obligation to review a 4-year, 2-venue, 4,000 page securities arbitration procedure and sort out where/what/when/why the case was dismissed with prejudice.

The Florida Court erred when it set forth a "bright line standard" that all clients who have been damaged by 2-years of unanswered motions in a securities arbitration proceeding leading to dismissal with prejudice must ignore the merits of an appeal, remit $200,000 to another attorney to miraculously cure the prior attorneys 2-years/8-unanswered motions/"I DON'T KNOW" when asked at hearing did your client produce documents. Hire another attorney to protect you and cure the prior attorney's negligence is great for business with 66,000 licensed attorneys in the state. However, the state court does not have the authority or power to usurp the Federal Arbitration Act and absolutely require a client to initiate a groundless or meritless appeal with utter disregard to the 5-grounds to appeal and the costs associated with an appeal.

The Florida Court erred when it ignored that the Supreme Court of Florida has absolutely only one type of case that absolutely requires post-conviction appellate review - CRIMINAL CONVICTION.

The Florida Court erred when it ignored the NASD Code

of Arbitration Procedure, particularly Code §10321, which absolutely places a time limitation upon discovery matters and the parties time period for filing objections (10 days) not 2-years beyond the July 25, 1995 ruling in the matter by the NASD Chairman limiting document production to July 25, 1995. Hence, any motions presented January 1996 to January 1998 were abusive pre-trial conduct which conduct required a response to the Motions by Petitioner's attorneys. Due to her attorneys' failure to respond the defendants in the underlying action continued to abuse, confuse and distort the true state of facts that the Petitioner had provided all documents, thus the attorneys failure to respond poisoned the minds of the newly convened NASD Panel who imposed the June 16, 1997 lesser discovery sanction order required to dismiss the case with prejudice under NASD Code §10305.

The Florida Court erred when it ignored this June 16, 1997 lesser sanction imposed upon the Petitioner and the ridiculous nature of the "lesser sanction" that required a party to a proceeding to produce 14 years of financial records — 9 years prior to the opening of the Dean Witter account and 5 years subsequent to the closing of the Dean Witter account. For the Florida Court to ignore the legal absurdity of producing financial records 5-years beyond the subject matter of the pending litigation brings into question the rationale of the Florida Court — is it designed to generate fees to Florida lawyers or to provide due process to the public citizens who pay the taxes for salaries for the judiciary designed to protect the public, not simply the profession of attorney at law in Palm Beach County, Florida.

The Florida Court ignored that the June 16, 1997 "discovery sanction order" was a ruling well-outside of the time period of the NASD Code §10321, hence the 14 year onerous documents/discovery sanction constituted the "lesser sanction" required by the NASD to dismiss with case with prejudice pursuant to NASD Code §10321,

The Florida Court ignored that legally cognizable damage

occurred to the client with the dismissal with prejudice from "quick, efficient and inexpensive" binding arbitration concerning matters 7-13 years too stale for meaningful trial on the merits at the affirmation of dismissal February 24, 1999.

The Florida Court ignored that Petitioner's attorneys for 24-months (January 1996 to January 1998) took no precaution whatsoever to protect their client interests and failed to respond to any motions regarding simple, standard and usual pre-trial matters. And, the Florida Court ignored the fact that the attorneys failed to inform their client that these important pre-trial motions were pending, documents already produced were being requested again, or that any matters regarding Petitioner's obligation to produce documents was pending. And, the Florida Court ignored that the attorneys failed to prepare for or advise their client that any Motions to Dismiss with Prejudice were pending at any time during the years 1996 to 1998. And, in fact, the attorneys led their client to believe the case was being handled properly and set for Final Hearing January 24, 1998. And, the Florida Court ignored that at the Final Hearing Pre-Trial Conference when the NASD Panel asked Petitioner's attorney, "Did she (your client) produce the documents?" Petitioner's attorney's response, "I DON'T' KNOW" resulted in the dismissal with prejudice, combined with the prior 24-months of silence from her attorneys and failure to uphold their duty and standard of care to protect their client's interest in her securities arbitration case.

To place blame upon the NASD Panel and to place blame upon the client for their failure to cure the attorneys negligence is sheer legal ABSURDITY in any Court of law. As a result of this LEGAL ABSURDITY, the Florida Court has placed the profession of attorney at law in a "superior special status" unlike other likewise educated professionals who cause damage to their clients, the innocent public, thus placing attorneys at law in the State of Florida with "unequal protection" under the law as it is practiced in professional negligence/legal malpractice cases in the State of Florida.

Title 9 United States Code was enacted by the United States Congress July 1947, c. 392 1, 61 Stat. 669. The State Court in Florida does not have the judicial power or the judicial authority to modify Title 9 USC 1-14 and make a civil litigant appeal an arbitration award, particularly when the party has evaluated the securities binding arbitration case file to evaluate the facts and discovery of professional negligence wherein 8-motions were unanswered for 2-years. The State Court in Florida has exceeded the limits of their authority and oversteped their authority by absolutely requiring that Petitioner appeal or vacate an award.

Title 9 United States Code was enacted by the United States Congress and a State Court simply does not have the judicial power to modify the five-limited grounds to appeal or vacate an award and absolutely require a securities litigant to appeal to a higher court in the State of Florida with utter disregard to the five-limited grounds to appeal. In otherwords, the State Court of Florida has essentially re-written Title 9 United States Code 10 absolutely requiring all participants in a securities arbitration matter or any commercial arbitration matter to appeal the award of arbitration.

Respondents and the Court in Florida have failed to recognize that in Title 9 United States Code, "Arbitration" enacted by Congress that "1. Purpose of Arbitration - Policy of this title is to eliminate expense and delay of extended court proceedings preliminary to arbitration." The fundamental purpose of Title 9 "Arbitration" is to relieve the parties from costly litigation and to help ease congested court dockets. Furthermore, the purpose of arbitration is to expedite the disposition of commercial disputes without the restrictive conditions characteristic of judicial proceedings under this title does not include reviewing questions of law. Judicial review of arbitral decisions in disputes should be limited to unusual cases like fraud or corruption."

Therefore, to have expected and required the Petitioner to a higher court to correct her attorneys failure to respond for 2-years

to motions already ruled upon, negates the purpose of arbitration, which is designed to be cost effective, efficient and essentially "take the place of costly and time consuming litigation to ease the burden and expense upon the parties and the Court." See Title 9 United States Code 10-14.

The Court in Florida has ignored that the Federal Arbitration Act and Federal Securities Laws under the Securities Exchange Act 1934 have been mandated by Congress and preempt state statutes and state court actions and "preemption is automatic over all state court actions and states statutes - **See Kroog v. Mait, 712 F. 2d 1148 (7th Cir. 1983).** Therefore, the Florida Court cannot absolutely require a party to an arbitration proceeding prior to initiating or maintaining legal malpractice action to appeal or vacate an award when the party to an arbitration proceeding has made a reasonable evaluation of the underlying case to determine they have none of the 5-limited grounds to appeal designated by the Federal Arbitration Act USC 9§10.

The Florida Court ignored that summary judgment cannot be rendered as fact issues remain as to whether the attorney (s) pursued all avenues in underlying action precluded summary judgment in legal malpractice actions - **see Romans v. Haymes 676 So. 2d 505 (Fla. App. 1 Dist. 1996).** As a result of the district Court's denial to the Petitioner to invoke the discretion of the Florida Supreme Court, the Petitioner cannot appeal to the Court to rectify this contradictory ruling between different district Courts within the State of Florida.

The Florida Court has made it perfectly clear that an arbitration award may not be set aside by the Court except upon grounds in the Federal Arbitration Act U.S.C. 9§10, namely specific acts of misconduct by the arbitrators; and that the reviewing court may not comb the record of arbitration proceddings for errors of fact or law inherent in the decision making process. **See Boyham v. Maguire 693 So. 2d 659 (Fla. App. 4 Dist. 1997) and Cassedy v. Merrill Lynch, 751 So. 2d**

143 (Fla. App. 1 Dist 2000). Thus, Petitioner's legally cognizable damages were sustained when her action was dismissed with prejudice and affirmed as dismissed with prejudice February 1999. It is not the duty, obligation or responsibility of the District Court to comb the record and overlook the June 16, 1997 lesser sanction to falsely conclude that the arbitrators erred. The District court not only erred when it failed to locate the June 16, 1997 14-year discovery sanction, it totally ignored the NASD Code of Arbitration Procedure closing discovery in a prior venue July 25, 1995 pursuant to NASD Code of Arbitration Procedure. Additionally, the District Court erred by ignoring the prior venue matters, the 2-years of 8-unanswered motions, and the time period to conclude discovery under the NASD Code of Arbitration Procedure closing discovery in a prior venue July 25, 1995 pursuant to NASD Code Section 10321.

The Florida Court ignored that the "standard of review applicable to challenges of a arbitration award is very limited with a high degree of conclusiveness attaching to the arbitration award In order to preserve the integrity of the arbitration process, courts will not review the findings of facts contained in an award and will never undertake to substitute their judgment for that of the arbitratiors." - See **Charbonneau v. Morse Operations 727 So.2d 1017 4 DCA.** And, the Florida Court ignored that a cause of action for legal malpractice based upon actions of client's attorney in connection with prior transaction accrues at conclusion of the subseuent litigation between client and third party. Hence, the conclusion of the NASD confirmation of dismissal with prejudice pursuant to NASD Code Section 10305 February 1999 concluded the subsequent litigation between client and third party - See **Taracido v. Perez-Abreu 705 So. 2d 41 (3 DCA 1997).**

The Florida Court ignored that the Courts require the party challenging an arbitration award to allege specific facts indicating improper motives on the part of the arbitrators, or at least, specific facts which create a reasonable impression of partiality - **See Toyota of Berkeley v. Local 1095, 834 F. 2d 751 (9th Cir. 1987);**

Park v. First Union Brokerage Services, Inc. 926 F. Supp. 1085, 1088 (M.D. Fla. 1996). The Petitioner simply had no specific acts to rely upon to challenge the Federal Arbitration Act 5-grounds to appeal her NASD case that was dismissed with prejudice due to attorney error, not arbitrator error as the arbitrators had imposed the "lesser sanction" June 16, 1997 required under the NASD Code to dismiss with prejudice under NASD Code§10305. And, the Court ignored "that a client's failure to pursue appeal in underlying litigaition did not constitute abandonment of legal malpractice claim - **See Hunzinger v. Quarles & Bradley 735 So. 2d 589 (Fla. App. 4 Dist.1999).** Thus, it is not the client's duty to initiate or complete an appeal when the legal negligence of 2-years and 8-unanswered abusive discovery motions in a second venue regarding discovery matters concluded properly under NASD Code of Arbitration Procedure in the prior venue are glaringly obvious in the underlying NASD case file. The Court has concluded, "in the absence of the five grounds, the trial court does not have the authority to vacate the arbitration award." - **See Okun v. Litwin Securities, Inc. 619 So. 2d 995 (Fla. App.3 Dist, 1993).** The Court has stated that "only under narrow circumstances should cause of action for legal malpractice be deemed abandoned based upon the voluntary dismissal of the appeal taken from a related judgment." - **See Eastman v. Flor-Ohio 744 So. 2d (Fla. App 5 Dist 1999; Silverstone v. Edell 721 So. 2d 11173, 1175, Fla. 1998; Ferrari v. Vining 744 So. 2d 480; Chapman v. Garcia 463 So. 2d 528, 529 Fla. 3 DCA 1985.**

The Florida Court misinterpreted and ignored that "not every party who suffers loss and attributes that loss to legal malpractice is required to obtain final appellate determination of underlying cause before asserting claim for legal malpractice as test for determining when cause of action arises is when existence of redressable harm has been established; in some a cases redressable harm caused by errors in course of litigation can only be determined upon completion of appellate process, and in other cases, failure to obtain appellate review should not bar an action for malpractice." - See **Segall v. Segall 632 So. 2d 76 (Fla. App 3**

DCA 1993).

The Circuit Court entered summary judgment on the grounds with substantial flawed reasoning when it concluded that "where a party's loss results from judicial error occasioned by the attorney's curable, non-prejudicial mistake in the conduct of the litigation, and the error would most likely have been corrected on appeal, the cause of action for legal malpractice is abandoned if a final appellate decision is not obtained. See **Pennsylvania Ins. Guar. Assn v. Sikes, 590 So. 2d 1051 (Fla. 3d DCA 1991).**

The critical words ***"attoneys curable, non-prejudicial mistake in the conduct of the litigation"*** were ignored by the Court in Florida as Petitioner's case had been pending for 4-years, in 2-venues with four Final Hearings canceled due to attorneys' negligence and failure to inform the second venue NASD Panel during the time period January 1996 to January 1998 that discovery was completed in a prior venue. At that juncture, ten (10) arbitrators had been convened over a 4-year discovery sanction, followed by 6-months of additional unanswered motions, concluded with "I don't Know" when asked "Did she (client) produce documents?" at the Dismissal with Prejudice Hearing. The attorneys' 2-years unanswered motions was attorney negligence that was prejudicial to the client and with a Case spiraling out of "court" for 4-years, the case was not curable on appeal as the facts were 7-13 years too stale at the dismissal with prejudice affirmation February 1999.

The words "would most likely have been corrected on appeal" raises issues as to "fortune teller error" in the Court's reasoning as no one can predict the future of "likelihood of a case" due to many unknown variables that surface. The point that a client is "required to seek appellate correction, i.e., cure their attorneys 2-year 8-motion prior negligence, was totally ignored by the Florida Court. The Court's flawed reasoning is best described as "fortune teller error crystal ball gazing" as to the likelihood of future appellate events that a client should not be subjected in the

first place had the attorneys simply upheld their standard and duty of care in the NASD case to respond to one of eight motions in a 24 month period or say "YES" in lieu of "I DON'T KNOW" when asked at a Dismissal with Prejudice Hearing, "Did your client produce documents?" Whether the likelihood of curing 2-years of 8-unanswered motions and one "I DON'T KNOW" on appeal should be the financial responsibility of the client or the attorneys who failed to answer motions for 2-years or make an inane statement is an issue for the Court to decide in the legal malpractice case prematurely dismissed under summary judgement as the Court ignored these genuine material facts in dispute or "WHY SHOULD THE CLIENT CURE THE NEGLIGENCE' CAUSING DISMISSAL WITH PREJUDICE AT THE CLIENT'S ADDITIONAL EXPENSE?".

There was "no likelihood" that Petitioner could have, would have or should have been the party to cure the prior 24-months of attorney negligence. Defendants' affiants are guilty of "FORTUNE TELLER ERROR," ignore the NASD CODE OF PROCEDURE, the June 16, 1997 Discovery Sanction and the fact that it is LEGALLY ABSURD for a client to expend 2-years and $200,000 to cure their attorney's prior 2-years negligence. Defendants' affiant's statement that "in all likelihood the client would have cured the negligence on appeal ignores" Title 9 1-14 ignores the redressable harm to the client, and ignores the sheer absurdity that there is something to cure, i.e. ATTORNEY NEGLIGENCE. Petitioner is a 60 year old single female struggling 7 years to prosecute the arbitration regarding the loss of 30 years of her life savings. The Florida Court erred when it ignored that elderly single citizens earning minimal wage cannot afford $40,000 to bring a case to NASD arbitration battling a behemoth Dean Witter then expend $200,000 to cure their attorney's negligence causing the client the redressable harm - dismissal with prejudice.

The Court erred when it concluded that a party cannot ascertain whether there has been any actionable error by an

attorney when the 4-year NASD case file is glaringly obvious that subsequent to the change of venue, redundant and abusive discovery requests already rule upon in a prior venue were re-presented and unanswered for 24 months (January 1996 to January 1998). A client simply should not be required to obtain appellate relief when the NASD case file is replete with unanswered motions to support her claim for professional negligence/legal malpractice. To deny a client's reasonable evaluation of the underlying case to ascertain the merits of a appeal under the Federal Arbitration Act grounds denies the opportunity for the client to a reasonable assessment and evaluation of the financial ramifications to expend $200,000 to attempt to cure their attorneys' negligence with appellate relief vis-a-vis the likelihood of success at sole expense to the client due to attorney negligence. Moreover, why should a client "cure their attorneys failure for 2-years to respond to redundant motions?" The costs to attempt to "cure the negligence" are borne solely by the client, not a fincncial partnership formed by the former attorneys and the client. The Court ignored that at the dismissal with prejudice from binding arbitration this is when the client sustained "legally cognizable damages" to support, initiate and maintain a claim for professional negligence/legal malpractice as the client is solely responsible to "cure her attorneys prior 2-years negligence" when she seeks appellate relief from the negligence.

The Fourth District Court erred when it replaced the duty of the circuit court members of the jury to ascertain whether or not the attorneys failed to uphold the standard and duty of care to a client to answer 8-motions in 24 months; and the District Court erred when it replaced the duty of the circuit court members of the jury to ascertain whether or not the attorneys allowed abusive discovery motions previously ruled upon in a prior venue to continue unabated for 24-months causing the prejudicial error to their client, dismissal with prejudice; and the District Court erred when it replaced the duty of the circuit court members of the jury to comb the 4-year underlying NASD case file when it missed the fact that on June 16, 1997, 24-months beyond the close of

discovery in July 25, 1995, that the June 1997 newly convened South Florida NASD Panel imposed a 14-year discovery sanction upon their client causing contradictory confusion; and the District Court erred when it failed to recognize that Petitioner's attorneys had 6-additional months and two additional motions to rectify the "14-year discovery sanction;" and the District Court erred when it replaced the duty of the members of the jury at the circuit court to determine that attorney error over a 24-month period caused the noncurable dismissal with prejudice as the client's case had been languishing for 4-years in 2-venues with 4-cancellations of Final Hearing concerning events 7-13 years too stale for meaningful trial in any court of law. And, more importantly, the District Court erred when they became the jury members and ignored that these genuine issues and material facts were in dispute, thus the summary judgment rendered by the circuit court (the matter on appeal) was a violation of Petitioner's rights and that movants were not entitled to summary judgment as a matter of law with these numerous, genuine material facts in dispute as only questions of law are presented in a motion for summary judgment - **See Gaines v. Haughton, 645 F. 2d 761 (9th Cir. 1981).** The purpose of a motion for summary judgment before the circuit court is to determine whether any genuine issues of material fact exist for the determination of the tier of fact - **See CSX Transp. v. Pasco County 660, So. 2d 757 (Fla. Dist. Ct. App. 1995).**

The Respondents were not entitled to summary judgment because there was evidence in the record to support a finding that the Defendants were negligent and acted with actual malice towards the Petitioner - **See Masson v. New Yorker Magazine, Inc. 501 U.S. 496 (1991).** It is improper for the trial court in Florida to enter summary judgment unless the trial court concludes that the facts of the action are so crystallized that the disposition of the questions of law is all that remains for the trial court to determine - **See 4444 Corp. v. Orlando, 598 So. 2d 287 (Fla. Dist. Ct. App. 1992).**

Petitioner's rights to due process to the Florida Supreme

Court were capriciously truncated by the District Court by its denial to invoke the jurisdiction of the Florida Supreme Court; hence, the Petitioner was unable to ask the Florida Supreme Court to pass upon a question of great public importance and to be in direct conflict with decisions of other district ocurts of appeal in the State of Florida. **See Fla.R.Appellate Proceedure Rule 9.030 "Jurisdiction of the Florida Supreme Court."** And, the Petitioner's rights to due process were prematurely truncated when Petitioner was not granted a right to invoke the discretionary review of the Florida Supreme Court as the Supreme Court has already informed the lower courts that **ONLY ONE CASE – CRIMINAL - ABSOLUTELY REQUIRES APPELLATE REVIEW PRIOR TO INITIATING AND MAINTAINING A CAUSE OF ACTION FOR PROFESSIONAL NEGLIGENCE/ LEGAL MALPRACTICE.** Petitioner was denied this right as the District Court truncated her rights to review by the highest Court in the State of Florida resulting in Petitioner's filing this Petition to this Court to vacate the judgement of the lower Court and return this case for trial as to Petitioner's financial damages as a result of her attorneys negligence.

There are no Florida Statutes that absolutely require any party to any civil judicial proceeding, particularly arbitration conducted under United States Code Title 9, that absolutely requires that Petioner appeal her case to a higher tribunal.

The Respondents and the lower Courts in Florida have failed to recognize that The Florida Supreme Court has made it perfectly clear to the lower courts that the ONLY JUDICIAL CASE in the State of Florida that absolutely requires appellate or post-conviction relief as a condition of bringing and maintaining a legal malpractice claim with the Court, a bright line rule, that the statute of limitations period on malpractice does not commence until a party has obtained final or appellate judgment has been set forth in Steel v. Kehoe, 747 So. 2d 931 (Fla. 1999). In this instance, The Florida Supreme Court held and absolutely required ONLY ONE TYPE OF CASE THAT ABSOLUTELY REQUIRES

APPELLATE RELIEF when the Court required that ONLY a convicted criminal defendant MUST OBTAIN APPELLATE or post conviction relief as a pre-condition to initiating and maintaining a legal malpractice action. Ther are no other types of cases that absolutely require appellate review.

The Argument that Petitioner abandoned her appeal or was required to appeal when she discovered 2-years of unanswered motions that led to the dismissal with predjudice is not a valid reason to capriciously apply a "bright line rule" in the instant case or enter summary judgment in favor of Respondents/Attorneys.

The Florida Courts have capriciously ruled without statute or case law and applied their own set of rules in the current case, which are an egregious abuse of discretion by he lower Courts in Florida designed purely to provide unequal protection under the law to the own profession, "attorney at law Palm Beach County" with utter disregard to their self-serving abuse of discretion and violation of the "equal protection" under the laws for all professional persons in a civil action. In this instance, the lower Florida Courts have turned their head while exceeding their authority to absolutely require that Petitioner obtain appellate relief, i.e., "cure her attorneys negligence" prior to initiating and maintaining a cause of action for professional negligence/legal malpractice.

The lower Florida Courts/Palm Beach County have encouraged this abuse of discretion in order to insulate "their brethren attorneys in Palm Beach County' while capriciously ignoring the Florida Supreme Court absolute requirement that only Criminal case require appellate review. The denial to invoke the discretionary review of the Florida Supreme Court exemplifies this prejudicial, biased abuse of discretion by the Courts in Florida, Palm Beach County.

Petitioner's legally cognizable damages were sustained when her case was dismissed with prejudice from binding

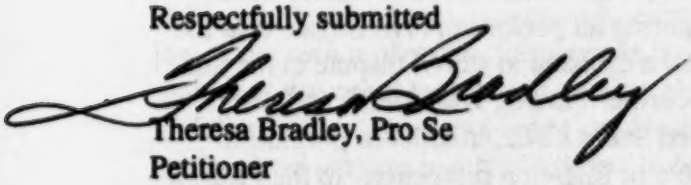
arbitration as a result of her attorneys negligence and failure to respond to discovery motions already properly concluded July 1995 under NASD Code of Arbitration Procedure. The attorneys negligence caused the dismissal with prejudice, not arbitrator error. The Petitioner should not be required, due to the capricious action by lower Court in Florida without statute or case law in support, to "cure her attorneys negligence" prior to initiating and maintaining a professional negligence/legal malpractice action in the State of Florida as this violates the essence of Title 9 U.S.C. 1-14.

The Courts in Florida/Palm Beach County cannot act as the legal screen to comb a 4-year NASD arbitration record and overlook the 2-years of eight (8) unanswered motions by attorneys who failed to uphold the standard of care to their own client. And, the lower Court in Florida, Palm Beach County, cannot write statutory guidelines requiring all persons in civil litigation in the State of Florida to appeal a decision in a civil dispute in the State of Florida, including securities binding arbitration conducted pursuant to Title 9 United States Code, in order to provide an "unequal insulated bubble of litigation protection" to their fellow attorneys/brethren guilty of professional negligence/legal malpractice when 2-years of unanswered motions are blatantly obvious in the case file. And the Florida Courts cannot require, demand and expect the client to "cure the attorneys negligence" at great cost and expense to the client whose legally cognizable damages were rendered as a result of her attorneys negligence when the case was dismissed with prejudice from binding arbitration. Such self-serving "attorney protectionism" violates the essence of the "equal protection of the laws" for equally educated professionals who fail to uphold their simple duty to respond to a motion or respond in some fashion other than "I don't know" when standing at a tribunal with a Motion to Dismiss with Prejudice pending when asked, "Did your client produce documents?"

One the basis of the foregoing, the Petition for Writ of Certiorari should be granted. And, for the these reasons the United

States Supreme Court must vacate the summary judgment and remand this case back to the trial court as to the damages sustained by the Petitioner to bring her case to quick, simple, efficient securities binding arbitration, the costs to prosecute this action, and the financial damages sustained as a result of her attorneys failure to bring her case to binding securities arbitration set for the fourth Final Hearing date January 24, 1998 prior to the dismissal with prejudice through no fault of their client who produced all of her financial records, federal income tax returns and paid for a NASD Code§10321 Documents/Discovery Exchange Hearing July 25, 1995 to insure that third-party subpoenas and documents were produced with time limitations relevant to the time period of the securities case.

Respectfully submitted



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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR FALM BEACH COUNTY, FLORIDA

THERESA LEACH BRADLEY,

Plaintiff,

v.

ADAM STEPHEN DONER; DAVIS, GORDON, DONER & CHANDLER, P.A.; JOHN WILLIAM CARROLL; JOHN WILLIAM CARROLL, P.A.;

Defendants.

CIVIL DIVISION
Case No.: CL 98-011183 AJ

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ORDER GRANTING DEFENDANTS MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER came before this Court on two Motions for Summary Judgment. Defendants John William Carroll and John William Carroll, P.A., jointly filed a Motion for Summary Judgment on January 24, 2000. Defendants Adam Stephen Doner and Davis, Gordon, Doner & Chandler, P.A., jointly filed a Motion for Summary Judgment on March 16, 2000.

Both Motions argue an identical legal issue: whether Plaintiff has abandoned her legal malpractice claims against Defendants. On April 28, 2000, a limited hearing was held as to whether Plaintiff had abandoned her legal malpractice claims against Defendants. Although additional arguments were made in the Motions, this Court is reserving its ruling as to these additional arguments.

The Court having reviewed the pleadings, memoranda of law, and affidavits; having considered the arguments of counsel

and Plaintiff, *prose*, all relevant legal authority; and having been otherwise advised, makes the following findings:

1. Plaintiff s Third Amended Complaint filed September 13, 1999, asserts legal malpractice claims against the subject attorneys and their respective law firms based upon their representation of Plaintiff in arbitration proceedings before the National Association of Security Dealers, Inc. (NASD).
2. Plaintiff alleges in her complaint that she was represented by Defendants at various times during NASD arbitration proceedings which sought to recover money damages from Dean witter Reynolds, Inc., and its agents (Dean Witter) for conducting unauthorized and excessive trading, engaging in in unsuitable investments, and churning of Plaintif f s investment account.
3. In the arbitration proceedings, an NASD panel rendered an Amended Award which dismissed Plaintiff s claims against Dean Witter with prejudice pursuant to Rule 10305(b) of the code of Arbitration Procedure.
4. Rule 10305(b) provides that the arbitrators may dismiss a claim . . . with prejudice as a sanction for willful and intentional material failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective. (emphasis added).
5. As a result of this adverse NASD panel ruling, Plaintiff filed a Motion for Rehearing to Vacate Arbitration Award (Motion for Rehearing) in Broward County Circuit Court. See Bradley v. Dean Witter, et. al., Case No. 98-06681-03 (Fla. 17th Jud. Cir. 1999).
6. In the Motion for Rehearing, Plaintiff argued, *inter alia*, that Rule 10305(b) required the imposition of a lesser sanction prior to dismissing the claims with prejudice. However, before the Broward Circuit Court ruled on Plaintiff s Motion for Rehearing, Plaintiff filed a Motion to Stay Proceedings for Indefinite Period Not to Exceed 12 Months or in the Alternative

Voluntary Dismissal Without Prejudice Leaving NASD Charges in Abeyance. (Motion for Stay)

7. In the Motion for Stay, Plaintiff informed the Broward Circuit Court that she was prosecuting a professional negligence and legal malpractice suit against her former counsel who represented her in the NASD proceedings. Plaintiff also stated that she believed her malpractice action could preclude the need for her meritorious appeal pending before his Court in Broward County. Moreover, Plaintiff noted that confusion over the NASD arbitration remains for judicial review. Thereafter, on August 16, 1999, the Broward Circuit Court entered an order granting voluntary dismissal without prejudice.

8. Defendants John William Carroll and John William Carroll, P.A., have filed an affidavit from Howard A. Tescher, Esq., (Tescher Affidavit), in support of their Motion for Summary Judgment. Defendants Adam Stephen Doner and Davis, Gordon, Doner & Chandler, P.A., have adopted the Tescher Affidavit.

9. In the Tescher Affidavit, Mr. Tescher affirms that he is an attorney licensed to practice in the State of Florida who concentrates in securities litigation, broker arbitration and securities regulatory matters. Mr. Tescher states that he has served as arbitrator for the National Association of Securities Dealers (NASD), and is a member of the NASD s Practitioners Mediators Council. Mr. Tescher asserts that the Amended Arbitration Award which dismissed with prejudice Plaintiff s arbitration claims against Dean Witter, et. al., was clearly erroneous. Mr . Tescher states that the award could have been vacated either under 9 U.S.C. / 10(a)(3) [1] or 10(a)(4)[2] or under the non

[1] Vacation of award is warranted "[w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversey; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10 (a)(3).

statutory ground of manifest disregard of the law. Mr. Tescher asserts that had the Plaintiff sought to have the Amended Arbitration Award vacated, Plaintiff would have been granted such relief.

10. Defendants Adam Stephen Doner and Davis, Gordon, Doner & Chandler, P.A., have filed an affidavit from Michael R. Casey, Esq., (Casey Affidavit), in support of their Motion for Summary Judgment. Defendants john William Carroll and John William Carroll, P.A., have adopted the Casey Affidavit.

11. In the Casey Affidavit, Mr. Casey affirms that he is a licensed attorney who has practiced securities litigation and arbitration law for the last 20 years. Mr. Casey affirms that he is a member of the Board of Arbitrators of the NASD and ahs chaired numerous NASD arbitration panels. Mr. Casey asserts that the Amended Arbitration Award which dismissed Plaintiff s Claims with prejudice contained sufficient quasi-judicial error which in all likelihood would have been vacated had Plaintiff sought such relief. Mr. Casey stated that vacatuer was likely because the NASD panel had not imposed lesser sanctions before dismissing the claims.

12. In her responses to the Motions for Summary Judgment, Plaintiff asserts that she had no legal foundation to appeal her case subsequent to the NASD as the NASD did not commit error .... (Plaintiff s Second Amended Response to Defendants Motion for Summary Judgment and Memorandum of Law in Support to Deny Defendant s Motion at *f* 17). However, Plaintiff has offered no evidence to support this legal conclusion. Plaintiff has not offered any affidavits

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[2] Vacation of award is warranted "[w]here the arbitrators arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10 (a)(4) (emphasis added).

which contradict the expert opinions in the Tescher and Casey Affidavits.

13. Where a party s loss results from judicial error occasioned by the attorney s curable, non prejudicial mistake in the conduct of the litigation, and the error would most likely have been corrected on appeal, the cause of action for legal malpractice is abandoned if a final appellate decision is not obtained. Pennsylvania Ins. Guar. Ass n v. Sikes, 590 So. 2d 1051 (Fla. 3d DCA 1991).

14. A cause of action for legal malpractice generally does not accrue until the underlying legal proceeding has been completed on appellate review because, until that time, one cannot ascertain whether there has been any actionable error by the attorney. See Leehan v. Russell L. Forkey, P.A., 702 So. 2d 610, 611 (Fla. 4th DCA 1997) (citing Peat, Marwick, Mitchell & Co. v. Lane, 565 so. 2d 1323, 1325 (Fla. 1990)). The test for determining whether a cause of action for attorney malpractice remains is whether there is an existence of redressable harm. See id.

15. Defendants argue that Plaintiff has abandoned her legal malpractice cause of action by failing to prosecute her motion to vacate the arbitration award which asserted judicial error by the NASD. Defendants have filed affidavits form experts which assert that Plaintiff had a reasonable chance of success on her motion to vacate the arbitration award. Plaintiff has not filed any affidavits which challenge the expert opinions in Tescher Affidavit and Casey Affidavit. Although Plaintiff averred during the hearing on the Motions for Summary Judgment that she was a securities expert and that she had not abandoned her claims by failing to prosecute her motion to vacate the Arbitration Award in Broward County, Plaintiff s unsworn testimony is insufficient to create a genuine issue of material fact.

16. Considering that Plaintiff voluntarily dismissed her Broward County action seeking to vacate the adverse NASD arbitration ruling, that Plaintiff admitted in her Broward County pleadings that she believed that her action to vacate the arbitration ruling had merit, and that the uncontested affidavits in the record show that she had a reasonable likelihood of success in seeking to vacate that ruling, Plaintiff cannot establish as a matter of law that she has incurred a redressable harm. Hence, this Court finds that Plaintiff has abandoned her legal malpractice cause of action. Defendants are therefore entitled to summary judgment.
IT IS THEREFORE ORDERED AND ADJUDGED as follows

A. The Motions for Summary Judgment filed by Defendants John William Carroll and John William Carroll, P.A., and Defendants Adam Stephen Doner and Davis Gordon, Doner & Chandler, P.A. are hereby **GRANTED.**

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 15th day of May, 2000.

/s/ Thomas H. Barkdull, III
Circuit Judge

Copies to:
Theresa Leach Bradley, *pro se,* 8560 Beacon Hill Road, Palm Beach Gardens, Florida 33410
K. Stuart Goldberg, Esq., Sonneborn, Rutter, Cooney, et. al., 1545 Center Park Drive, West Palm Beach Florida 33401
Gary R. Shendell, Esq., Stephens, Lynn, et. al., 515 N. Flagler Drive, Suite #1600, West Palm Beach, Florida 33401

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

APRIL 4, 2001

CASE NO.: 4D00-1765
L.T. No.: 98-11183 AJ

THERESA BRADLEY vs. ADAM STEPHEN DONER ETC, ET AL.

Appellant/Petitioner(s) Appelle/Respondent(s)

BY ORDER OF THE COURT:

ORDERED that appellant s March 19, 2001, Request For Certification To Invoke The Descretionary Jurisdiction Of The Supreme Court Of The State Of Florida is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Theresa Bradley Paul Buschmann William T. Viergever
Gary R. Shendell K. Stuart Goldberg

ch

/ s / Marilyn Beuttenmuller
CLERK
Fourth District Court of Appeal

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM 2001

THERESA BRADLEY,

Appellant

v.

ADAM STEPHEN DONER DAVIS, GORDON, DONER & CHANDLER, P.A., JOHN WILLIAM CARROLL; and JOHN WILLIAM CARROLL, P.A.

Appellees.

CASE NO. 4D00-1765

Opinion filed February 21, 2001

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Thomas H. Barkdull, III, Judge; L.T. Case No. CA 98-1183-AJ.

Theresa H. Bradley, Palm Beach Gardens, pro se.

Paul Buschmann of Michaud, Buschmann, Fox & Mittelmark, P.A., Boca Raton, for Appellees-John William Carroll and John William Carroll, P.A.

William T. Viergever of Sonneborn, Rutter, Cooney,

Klingsmith & Eyler, P.A., West Palm Beach, for Appellees-Adam, Stephen, Doner and Davis Gordon Doner & Chandler, P.A.

KLEIN, J.

Appellant plaintiff sued the appellees for negligently representing her on her securities claims for churning, causing her arbitration claim against a securities firm to be dismissed with prejudice. Because appellant did not appeal the dismissal, the trial court granted the defendant s motion for summary judgment in this action, concluding that plaintiff s failure to pursue an appeal barred her malpractice claim. We affirm.

Plaintiff filed her claim for binding arbitration in 1996 against Dean Witter, before the National Association of Securities Dealers, Inc., alleging churning of her investment account which occurred in 1992. After her initial attorneys withdrew in 1997, she retained appellee Doner and his firm in 1997. Doner withdrew shortly after being retained, and she then retained appellee Carroll. After some discovery disputes and plaintiff s obtaining several postponements of the arbitration, the arbitrators dismissed her claim with prejudice pursuant to rule 10305(b) of the NASD Code of Arbitration Procedure, which provides:

> The arbitrators may dismiss a claim, defense, or proceeding with prejudice as a sanction for willful and intentional material failure to comply with the order of the arbitrator(s) if lesser sanctions have proven ineffective.

Plaintiff filed an appeal, as is authorized under section 9 U.S.C.A & 10(a)(4) of the Federal Arbitration Act; however she did not pursue it, and it was dismissed. As an alternative to voluntary dismissal, plaintiff moved for a stay of her appeal for an indefinite period not to exceed twelve months, alleging that her malpractice action against her lawyers would preclude the need for her meritorious appeal.

In this action the defendants filed a motion for summary judgement supported by affidavits of two securities lawyers who rendered opinions that if plaintiff had pursued her appeal of the dismissal of the arbitration proceeding with prejudice, the dismissal with prejudice would have been reversed. Plaintiff did not file any opposing affidavits, and the trial court granted the motions for summary judgment.

The trial court relied on the line of cases which hold that a client cannot pursue a legal malpractice case if the mistake is in the original law suit would in all likelihood have been corrected on appeal, and the client did not appeal. Segall v. Segall, 632 So. 2d 76 (Fla. 3d DCA 1993); Pennsylvania Ins. Guar. Ass n v. Sikes, 590 So. 2d 1051 (Fla. 3d DCA 1991); Hunzinger Const. Corp. v. Quarles & Brady General Partnership, 735 So. 2d 589 (Fla. 4th DCA 1999), rev. denied, 766 So. 2d 222 (Fla 2000).

We agree with the defendants that in all likelihood plaintiff would have won her appeal of the dismissal with prejudice of the arbitration proceedings if she had pursued it. One of the affidavits of defendants experts, referring to rule 10305(b), which authorizes dismissal with prejudice only if lesser sanctions have proven ineffective, stated that there had been no lesser sanctions. We have reviewed the arbitration proceedings and agree with the defendants that there had been no lesser sanctions which had proven ineffective. Accordingly neither the discovery disputes, nor the postponements, warranted the ultimate sanction, dismissal with prejudice. Plaintiff has cited no authority, and our own research has not turned up any, which would support the proposition that this dismissal with prejudice would have been affirmed on appeal under federal or Florida law. We therefore affirm.

FARMER and TAYLOR, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

Supreme Court of Florida

Monday, August 20, 2001

CASE NO.: SC01-519
Lower Tribunal No.: 4D00-1765

THERESA BRADLEY vs. ADAM STEPHEN DONER
DAVIS, GORDON,
DONER & CHANDLER,
P.A., ET AL.

Petitioner(s) Respondent(s)

This case is hereby dismissed on the Court s own motion based on petitioner s failure to timely file the amended jurisdictional brief.

A True Copy
Test:

/ s / Thomas D. Hall
CLERK, SUPREME COURT

kt
Served:

THERESA BRADLEY
WILLIAM T. VIERGEVER
PAUL BUSCHMANN
GARY ROBERT SHENDELL
HON. THOMAS BARKDULL, III, JUDGE
HON. MARILYN BEUTTENMULLER, CLERK
HON. DOROTHY H. WILKEN, CLERK

ARBITRATION U.S.C.9§10

10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any part to the arbitration-

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearsing by the arbitrators.

July 30, 1947, c. 392, 61 Stat. 672.

10300. UNIFORM CODE OF ARBITRATION

10301. Required Submission

(a) Any dispute, claim, or controversy eligible for submission under the Rule 10100 Series between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer. A claim involving a member in the following categories shall be ineligible for submission to arbitration under the Code unless the customer agrees in writing to arbitrate the claim after it has arisen:

(1) A member whose membership is terminated, suspended, canceled, or revoked;

(2) A member that has been expelled from the NASD; or

(3) A member that is otherwise defunct.

(b) Under this Code, the Director of Arbitration, upon approval of the Executive Committee of the National Arbitration and Mediation Committee, or the National Arbitration and Mediation Committee, shall have the right to decline the use of its arbitration facilities in any dispute, claim, or controversy, where, having due regard for the purposes of the Association and the intent of this Code, such dispute, claim, or controversy is not a proper subject matter for arbitration.

(c) Claims which arise out of transactions in a readily identifiable market may, with the consent of the Claimant, be referred to the arbitration forum for that market by the Association.

(d) Class Action Claims

(1) A claim submitted as a class action shall not be eligible for arbitration under this Code at the Association.

(2) Any claim filed by a member or members of a putative or certified class action is also ineligible for arbitration at the Association if the claim is encompassed by a putative or certified class action filed in federal or state court, or is ordered by a court to an arbitral forum not sponsored by a self-regulatory organization for classwide arbitration. However, such claims shall be eligible for arbitration in accordance with paragraph (a) or pursuant to the parties' contractual agreement, if any, if a claimant demonstrates that it has elected not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.

Disputes concerning whether a particular claim is encompassed by a putative or certified class action shall be referred by the Director of Arbitration to a panel of arbitrators in accordance with Rule 10302 or Rule 10308, as applicable. Either party may elect instead to petition the court with jurisdiction over the putative or certified class action to resolve such disputes. Any such petition to the court must be filed within ten business days of receipt of notice that the Director of Arbitration is referring the dispute to a panel of arbitrators.

(3) No member or associated person shall seek to enforce any agreement to arbitrate against a customer, other member or person associated with a member who has initiated in court a putative class action or is a member of a putative or certified class with respect to any claims encompassed by the class action unless and until: (A) the class certification is denied; (B) the class is decertified; (C) the customer, other member or person associated with a member is excluded from the class by the court; or (D) the customer, other member or person associated with a member elects not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.

(4) No member or associated person shall be deemed to have waived any of its rights under this Code or under any agreement to arbitrate to which it is party except to the extent stated in this paragraph.

[Amended by SR-NASD-91-49 eff. Jan. 2, 1992; amended by SR-NASD-92-28 eff. Oct. 28, 1992; amended by SR-NASD-93-65 eff. Apr. 20, 1994; amended by SR-NASD-98-48 eff. Nov. 17, 1998; amended by SR-NASD-2001-08 eff. June 11, 2001.]

Selected Notices to Members: 84-51, 92-65.

10302. Simplified Arbitration

(a) Any dispute, claim or controversy arising between a public customer(s) and an associated person or a member subject to arbitration under this Code involving a dollar amount not exceeding $25,000, exclusive of attendant costs and interest, shall be arbitrated as hereinafter provided.

(b) The Claimant shall file with the Director of Arbitration an executed Submission Agreement and a copy of the Statement of Claim of the controversy in dispute and the required deposit, together with documents in support of the Claim. Sufficient additional copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and the arbitrator. The Statement of Claim shall specify the relevant facts, the remedies sought and whether a hearing is demanded.

(c) The Claimant shall pay a non-refundable filing fee and shall remit a hearing session deposit as specified in Rule 10332 of this Code upon the filing of the Submission Agreement. The final disposition of the fee or deposit shall be determined by the arbitrator.

(d) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim. Within twenty (20) calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an executed Submission Agreement and a copy of Respondent's Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional

copies for the arbitrator(s) along with any deposit required under the schedule of fees for customer disputes. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third-Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third-Party Claim, the Respondent(s) shall serve the Third-Party Respondent with an executed Submission Agreement, a copy of the Respondent's Answer containing the Third-Party Claim, and a copy of the original Claim filed by the Claimant. The Third-Party Respondent shall respond in the manner herein provided for response to the Claim. If the Respondent(s) files a related Counterclaim exceeding $25,000 exclusive of attendant costs and interest, the arbitrator may refer the Claim, Counterclaim and/or Third-Party Claim, if any, to a panel of three (3) arbitrators in accordance with Rule 10308 or, he may dismiss the Counterclaim and/or Third-Party Claim without prejudice to the Counterclaimant(s) and/or Third Party Claimant(s) pursuing the Counterclaim and/or Third Party Claim in a separate proceeding. The costs to the Claimant under either proceeding shall in no event exceed the total amount specified in Rule 10332.

(e) All parties shall serve on all other parties and the Director of Arbitration, with sufficient additional copies for the arbitrator(s), a copy of the Answer, Counterclaim, Third-Party Claim, Amended Claim, or other responsive pleading, if any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either (1) serve on each party and on the Director of Arbitration, with sufficient additional copies for the arbitrator(s), a Reply to any Counterclaim or, (2) if the amount of the Counterclaim exceeds the Claim, shall have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings shall be discontinued without prejudice to the rights of the parties.

(f) The dispute, claim or controversy shall be submitted to a single public arbitrator knowledgeable in the securities industry appointed by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator calls a hearing, the arbitrator

shall decide the dispute, claim or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.

(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.

(h)(1) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.

(2) If a hearing is demanded or consented to in accordance with paragraph (f), the General Provisions Governing Pre-Hearing Proceedings under Rule 10321 shall apply.

(3) If no hearing is demanded or consented to, all requests for document production shall be submitted in writing to the Director of Arbitration within ten (10) business days of notification of the identity of the arbitrator selected to decide the case. The requesting party shall serve simultaneously its request for document production on all parties. Any response or objections to the requested document production shall be served on all parties and filed with the Director of Arbitration within five (5) business days of receipt of the requests for production. The appointed arbitrator shall resolve all requests under this Rule on the papers submitted.

(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.

(j) In any case where there is more than one (1) arbitrator, the majority shall be public arbitrators.

(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.

(l) Except as otherwise provided herein, the general arbitration rules of the Association shall be applicable to proceedings instituted under this Rule.

[Amended eff. Oct. 1, 1984; Apr. 1, 1988; May 10, 1989; June 1, 1990; Apr. 26, 1991; Jan. 8, 1992; Sept. 8, 1992; amended by SR-NASD-97-22 eff. Nov. 17, 1998.]

Selected Notices to Members 97-90.

IM-10302. Related Counterclaim

As used in Rule 10302, the term "related Counterclaim" shall mean any Counterclaim related to a customer's accounts with a member.

10303. Hearing Requirements - Waiver of Hearing

(a) Any dispute, claim or controversy except as provided in Rule 10203 (Simplified Industry Arbitration) or Rule 10302 (Simplified Arbitration), shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.

(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may request the submission of further evidence.

10304. Time Limitation Upon Submission

No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

[Amended eff. Oct. 1, 1984.]

10305. Dismissal of Proceedings

(a) At any time during the course of an arbitration, the arbitrators may, either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties to their judicial remedies, or to any dispute resolution forum agreed to by the parties, without prejudice to any claims or defenses available to any party.

(b) The arbitrators may dismiss a claim, defense, or proceeding with prejudice as a sanction for willful and intentional material failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective.

(c) The arbitrators shall at the joint request of all the parties dismiss the proceedings.

[Amended by SR-NASD-97-34, eff. Aug. 6, 1997; SEC Rel. No. 34-38907 (08/14/97)]

10306. Settlements

All settlements upon any matter shall be at the election of the parties.

10307. Tolling of Time Limitation(s) for the Institution of Legal Proceedings and Extension of Time Limitation(s) for Submission to Arbitration

(a) Where permitted by applicable law, the time limitations which would otherwise run or accrue for the institution of legal proceedings shall be tolled where a duly executed Submission Agreement is filed by the Claimant(s). The tolling shall continue for such period as the Association shall retain jurisdiction upon the matter submitted.

(b) The six (6) year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim or controversy to a court of competent jurisdiction. The six (6) year time limitation shall not run for such period as the court shall retain

jurisdiction upon the matter submitted.

[Amended eff. Oct. 1, 1984.]

10308. Selection of Arbitrators

This Rule specifies how parties may select or reject arbitrators, and who can be a public arbitrator.

(a) Definitions

(1) "day" For purposes of this Rule, the term "day" means calendar day.

(2) "claimant" For purposes of this Rule, the term "claimant" means one or more persons who file a single claim.

(3) "Neutral List Selection System" The term "Neutral List Selection System" means the software that maintains the roster of arbitrators and performs various functions relating to the selection of arbitrators.

(4) "non-public arbitrator" The term "non-public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:

(A) is, or within the past three years, was:

(i) associated with a broker or a dealer (including a government securities broker or dealer or a municipal securities dealer);

(ii) registered under the Commodity Exchange Act;

(iii) a member of a commodities exchange or a registered futures association; or

(iv) associated with a person or firm registered under the Commodity Exchange Act;

(B) is retired from engaging in any of the business activities listed in subparagraph (4)(A);

(C) is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional work, in the last two years, to clients who are engaged in any of the business activities listed in subparagraph (4)(A); or

(D) is an employee of a bank or other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

(5) "public arbitrator"

(A) The term "public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and is not:

(i) engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D); or

(ii) the spouse or an immediate family member of a person who is engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D).

(B) For the purpose of this Rule, the term "immediate family member" means:

(i) a family member who shares a home with a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D);

(ii) a person who receives financial support of more than 50 percent of his or her annual income from a person engaged in the conduct or activities described in

paragraphs (a)(4)(A) through (D); or

(iii) a person who is claimed as a dependent for federal income tax purposes by a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D).

(6) "respondent" For purposes of this Rule, the term "respondent" means one or more persons who individually or jointly file an answer to a complaint.

(7) "send" For purposes of this Rule, the term "send" means to send by first class mail, facsimile, or any other method available and convenient to the parties and the Director.

(b) Composition of Arbitration Panel; Preparation of Lists for Mailing to Parties

(1) Composition of Arbitration Panel

(A) Claims of $50,000 or Less. If the amount of a claim is $50,000 or less, the Director shall appoint an arbitration panel composed of one public arbitrator, unless the parties agree to the appointment of a non-public arbitrator.

(i) If the amount of a claim is $25,000 or less and an arbitrator appointed to the case requests that a panel of three arbitrators be appointed, the Director shall appoint an arbitration panel composed of one non-public arbitrator and two public arbitrators, unless the parties agree to a different panel composition.

(ii) If the amount of a claim is greater than $25,000 and not more than $50,000 and a party in its initial filing or an arbitrator appointed to the case requests that a panel of three arbitrators be appointed, the Director shall appoint an arbitration panel composed of one non-public

arbitrator and two public arbitrators, unless the parties agree to a different panel composition.

(B) Claims of More Than $50,000. If the amount of a claim is more than $50,000, the Director shall appoint an arbitration panel composed of one non-public arbitrator and two public arbitrators, unless the parties agree to a different panel composition.

(2) One List for Panel of One Arbitrator If one arbitrator will serve as the arbitration panel, the Director shall send to the parties one list of public arbitrators, unless the parties agree otherwise.

(3) Two Lists for Panel of Three Arbitrators If three arbitrators will serve as the arbitration panel, the Director shall send two lists to the parties, one with the names of public arbitrators and one with the names of non-public arbitrators. The lists shall contain numbers of public and non-public arbitrators, in a ratio of approximately two to one, respectively, to the extent possible, based on the roster of available arbitrators.

(4) Preparation of Lists

(A) Except as provided in subparagraph (B) below, the Neutral List Selection System shall generate the lists of public and non-public arbitrators on a rotating basis within a designated geographic hearing site and shall exclude arbitrators based upon conflicts of interest identified within the Neutral List Selection System database.

(B) If a party requests that the lists include arbitrators with expertise classified in the Neutral List Selection System, the lists may include some arbitrators having the designated expertise.

(5) Sending of Lists to Parties

The Director shall send the lists of arbitrators to all parties at the same time approximately 30 days after the last answer is due.

(6) Information About Arbitrators

The Director shall send to the parties employment history for each listed arbitrator for the past 10 years and other background information. If a party requests additional information about an arbitrator, the Director shall send such request to the arbitrator, and shall send the arbitrator's response to all parties at the same time. When a party requests additional information, the Director may, but is not required to, toll the time for the parties to return the ranked lists under paragraph (c)(2).

(c) Striking, Ranking, and Appointing Arbitrators on Lists

(1) Striking and Ranking Arbitrators

(A) Striking An Arbitrator

A party may strike one or more of the arbitrators from each list for any reason.

(B) Ranking - Panel of One Arbitrator

Each party shall rank all of the arbitrators remaining on the list by assigning each arbitrator a different, sequential, numerical ranking, with a "1" rank indicating the party's first choice, a "2" indicating the party's second choice, and so on.

(C) Ranking - Panel of Three Arbitrators

Each party shall rank all of the public arbitrators remaining on the list by assigning each arbitrator a different, sequential, numerical ranking, with a "1" rank indicating the party's first choice, a "2" indicating the party's second choice, and so on. Each party separately shall rank all of the non-public arbitrators remaining on the list,using the same procedure.

(2) Period for Ranking Arbitrators; Failure to Timely Strike and Rank

A party must return to the Director the list or lists with the rankings not later than 20 days after the Director sent the lists to the parties, unless the Director has extended the period. If a party does not timely return the list or lists, the Director shall treat the party as having retained all the arbitrators on the list or lists and as having no preferences.

(3) Process of Consolidating Parties' Rankings

The Director shall prepare one or two consolidated lists of arbitrators, as appropriate under paragraph (b)(2) or (b)(3), based upon the parties' numerical rankings. The arbitrators shall be ranked by adding the rankings of all claimants together and all respondents together, including third-party respondents, to produce separate consolidated rankings of the claimants and the respondents. The Director shall then rank the arbitrators by adding the consolidated rankings of the claimants, the respondents, including third- party respondents, and any other party together, to produce a single consolidated ranking number, excluding arbitrators who were stricken by any party.

(4) Appointment of Arbitrators

(A) Appointment of Listed Arbitrators

The Director shall appoint arbitrators to serve on the arbitration panel based on the order of rankings on the consolidated list or lists, subject to availability and disqualification.

(B) Discretion to Appoint Arbitrators Not on List

If the number of arbitrators available to serve from the consolidated list is not sufficient to fill a panel, the Director shall appoint one or more arbitrators to complete the arbitration panel. Unless the parties agree otherwise, the Director may not appoint a non-public arbitrator under paragraphs (a)(4)(B) or (a)(4)(C). The Director shall

provide the parties information about the arbitrator as provided in paragraph (b)(6), and the parties shall have the right to object to the arbitrator as provided in paragraph (d)(1).

(5) Selecting a Chairperson for the Panel

The parties shall have 15 days from the date the Director sends notice of the names of the arbitrators to select a chairperson. If the parties cannot agree, the Director shall appoint a chairperson from the panel as follows:

(A) The Director shall appoint as the chairperson the public arbitrator who is the most highly ranked by the parties as long as the person is not an attorney, accountant, or other professional who has devoted 50% or more of his or her professional or business activities, within the last two years, to representing or advising public customers in matters relating to disputed securities or commodities transactions or similar matters.

(B) If the most highly ranked public arbitrator is subject to the exclusion set forth in subparagraph (A), the Director shall appoint as the chairperson the other public arbitrator, as long as the person also is not subject to the exclusion set forth in subparagraph (A).

(C) If both public arbitrators are subject to the exclusion set forth in subparagraph (A), the Director shall appoint as the chairperson the public arbitrator who is the most highly ranked by the parties.

(6) Additional Parties

If a party is added to an arbitration proceeding before the Director has consolidated the other parties' rankings, the Director shall send to that party the list or lists of arbitrators and permit the party to strike and rank the arbitrators. The party must return to the Director the list or lists with numerical rankings not later than 20 days after the Director sent the lists to the party. The

Director shall then consolidate the rankings as specified in this paragraph (c).

(d) Disqualification and Removal of Arbitrator Due to Conflict of Interest or Bias

(1) Disqualification By Director
After the appointment of an arbitrator and prior to the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, if the Director or a party objects to the continued service of the arbitrator, the Director shall determine if the arbitrator should be disqualified. If the Director sends a notice to the parties that the arbitrator shall be disqualified, the arbitrator will be disqualified unless the parties unanimously agree otherwise in writing and notify the Director not later than 15 days after the Director sent the notice.

(2) Removal by Director
After the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, the Director may remove an arbitrator from an arbitration panel based on information that is required to be disclosed pursuant to Rule 10312 and that was not previously disclosed.

(3) Vacancies Created by Disqualification or Resignation
Prior to the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, if an arbitrator appointed to an arbitration panel is disqualified or is otherwise unable or unwilling to serve, the Director shall appoint from the consolidated list of arbitrators the arbitrator who is the most highly ranked available arbitrator of the proper classification remaining on the list. If there are no available arbitrators of the proper classification on the consolidated list, the Director shall appoint an arbitrator of the proper classification subject to the limitation set forth in paragraph (c)(4)(B). The Director shall provide the parties information about the arbitrator as provided in paragraph (b)(6), and the parties shall have the right to object to the arbitrator as provided in paragraph (d)(1).

(e) Discretionary Authority
The Director may exercise discretionary authority and make any decision that is consistent with the purposes of this Rule and the Rule 10000 Series to facilitate the appointment of arbitration panels and the resolution of arbitration disputes.

[Amended eff. July 1, 1986; Apr. 1, 1988; May 10, 1989; Oct. 7, 1992; amended by SR-NASD-97-22 eff. Nov. 17, 1998; amended by SR-NASD-98-48 eff. Nov. 17, 1998; amended by SR-NASD-98-64 eff. Nov. 17, 1998; amended by SR-NASD-00-34 eff. March 8, 2001.]

Selected Notices to Members: 98-90; 01-13.

10309. Composition of Panels

Except as otherwise specifically provided in Rule 10308, the individuals who shall serve on a particular arbitration panel shall be determined by the Director. Except as otherwise specifically provided in Rule 10308, the Director may name the chairman of the panel.

[Amended by SR-NASD-98-48 eff. Nov. 17, 1998.]

Selected Notices to Members 98-90

10310. Notice of Selection of Arbitrators

(a) The Director shall inform the parties of the arbitrators' names and employment histories for the past 10 years, as well as information disclosed pursuant to Rule 10312, at least 15 business days prior to the date fixed for the first hearing session. A party may make further inquiry of the Director concerning an arb10300. UNIFORM CODE OF ARBITRATION

10311. Peremptory Challenge

(a) In an arbitration proceeding, except as provided in Rule 10335, each party shall have the right to one peremptory challenge. In arbitrations where there are multiple Claimants,Respondents, and/or Third-Party Respondents, the Claimants shall have one peremptory challenge, the Respondents shall have one peremptory challenge, and the Third-Party Respondents shall have one peremptory challenge. The Director may in the interests of justice award additional peremptory challenges to any party to an arbitration proceeding. Unless extended by the Director, a party wishing to exercise a peremptory challenge must do so by notifying the Director in writing within 10 business days of notification of the identity of the person(s) named under Rule 10310 or Rule 10321(d) or (e), whichever comes first. There shall be unlimited challenges for cause.

(b) This Rule shall not apply to arbitration proceedings that are subject to Rule 10308.

[Amended eff. Oct. 1, 1984; amended by SR-NASD-91-49 eff. Jan. 2, 1992; amended by SR-NASD-93-38 eff. Jan. 3, 1996; amended by SR-NASD-97-34 eff. Aug. 6, 1997; SEC Rel. No. 34-38907 (08/14/97); amended by SR-NASD-98-48 eff. Nov. 17, 1998]

Selected Notices to Members 98-90

10312. Disclosures Required of Arbitrators and Director's Authority To Disqualify

(a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships or circum stances that they have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship or circum stances involving members of their families or their current employers, partners, or business associates.

(b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests, relationships or circumstances described in paragraph (a) above.

(c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(d) Removal by Director

(1) The Director may remove an arbitrator based on information that is required to be disclosed pursuant to this Rule.

(2) After the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, the Director may remove an arbitrator based only on information not known to the parties when the arbitrator was selected. The

Director's authority under this subparagraph (2) may be exercised only by the Director or the President of NASD Dispute Resolution.

(e) The Director shall inform the parties to an arbitration proceeding of any information disclosed to the Director under this Rule unless either the arbitrator who disclosed the information withdraws voluntarily as soon as the arbitrator learns of any interest, relationship, or circumstances described in paragraph (a) that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, or the Director removes the arbitrator.

[Amended eff. May 10, 1989; amended by SR-NASD-98-48 eff. Nov. 17, 1998; amended by SR-NASD-00-34 eff. March 8, 2001.]

Selected Notices to Members 98-90; 01-13.

10313. Disqualification or Other Disability of Arbitrators

In the event that any arbitrator, after the commencement of the earlier of (a) the first pre-hearing conference or (b) the first hearing but prior to the rendition of the award, should become disqualified, resign, die, refuse, or otherwise be unable to perform as an arbitrator, the remaining arbitrator(s) shall continue with the hearing and determination of the controversy, unless such continuation is objected to by any party within 5 days of notification of the vacancy on the panel. Upon objection, the Director shall appoint a replacement arbitrator to fill the vacancy and the hearing shall continue. The Director shall inform the parties as soon as possible of the name and employment history of the replacement arbitrator for the past 10 years, as well as information disclosed pursuant to Rule 10312. A party may make further inquiry of the Director concerning the replacement arbitrator's background. If the arbitration proceeding is subject to Rule 10308, the party may exercise his or her right to challenge the replacement arbitrator within the time remaining prior to the next scheduled hearing session by

notifying the Director in writing of the name of the arbitrator challenged and the basis for such challenge. If the arbitration proceeding is not subject to Rule 10308, within the time remaining prior to the next scheduled hearing session or the 10 day period provided under Rule 10311, whichever is shorter, a party may exercise the party's right to challenge the replacement arbitrator as provided in Rule 10311.

[Amended eff. Sept. 19, 1988; amended by SR-NASD-97-34 eff. Aug. 6, 1997; SEC Rel. No. 34-38907 (08/14/97); amended by SR-NASD-98-48 eff. Nov. 17, 1998.]

Selected Notices to Members 98-90.

10314. Initiation of Proceedings

Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:

(a) Statement of Claim

The Claimant shall file with the Director of Arbitration an executed Submission Agreement, a Statement of Claim of the controversy in dispute, together with the documents in support of the Claim, and the required deposit. Sufficient additional copies of the Submission Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and each arbitrator. The Statement of Claim shall specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.

b) Answer Defenses, Counterclaims, and/or Cross-Claims

(1) Within 45 calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an executed Submission Agreement and a copy of the Respondent's

Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees. The Answer shall specify all available defenses and relevant facts thereto that will be relied upon at the hearing and may set forth any related Counter-claim the Respondent(s) may have against the Claimant, any Cross-Claim the Respondent(s) may have against any other named Respondent(s), and any Third-Party Claim against any other party or person based upon any existing dispute, claim, or controversy subject to arbitration under this Code.

(2)(A) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who pleads only a general denial as an Answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting any facts or defenses at the time of the hearing.

(B) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to specify all available defenses and relevant facts in such party's answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting such facts or defenses not included in such party's Answer at the hearing.

(C) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to file an Answer within 45 calendar days from receipt of service of a Claim, unless the time to answer has been extended pursuant to subparagraph (5), below, may, in the discretion of the arbitrators, be barred from presenting any matter, arguments, or defenses at the hearing.

(3) Respondent(s) shall serve each party with a copy of any

Third-Party Claim. The Third-Party Claim shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees. Third-Party Respondent(s) shall answer in the manner provided for response to the Claim, as provided in subparagraphs (1) and (2) above.

(4) The Claimant shall serve each party with a Reply to a Counterclaim within ten (10) days of receipt of an Answer containing a Counterclaim. The Reply shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s).

(5) The time period to file any pleading, whether such be denominated as a Claim, Answer, Counterclaim, Cross-Claim, Reply, or Third-Party Pleading, may be extended for such further period as may be granted by the Director of Arbitration or with the consent of the initial claimant. Extensions of the time period to file an Answer are disfavored and will not be granted by the Director except in extraordinary circumstances.

(c) Service and Filing with the Director of Arbitration

(1) Service may be effected by mail or other means of delivery. Service and filing are accomplished on the date of mailing either by first-class postage pre-paid or by means of overnight mail service or, in the case of other means of service, on the date of delivery. Filing with the Director of Arbitration shall be made on the same date as service on a party.

(2) If a member firm and a person associated with the member firm are named parties to an arbitration proceeding at the time of the filing of the Statement of Claim, service on the person associated with the member firm may be made on the associated person or the member firm, which shall perfect service upon the associated person. If the member firm does not undertake to represent the associated person, the

member firm shall serve the associated person with the Statement of Claim, shall advise all parties and the Director of Arbitration of that fact, and shall provide such associated person's current address.

(d) Joinder and Consolidation Multiple Parties

(1) Permissive Joinder. All persons may join in one action as claimants if they assert any right to relief jointly, severally, or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all these claimants will arise in the action. All persons may be joined in one action as respondents if there is asserted against them, jointly or severally, any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all respondents will arise in the action. A claimant or respondent need not assert rights to or defend against all the relief demanded. Judgement may be given for one or more of the claimants according to their respective rights to relief, and against one or more respondents according to their respective liabilities.

(2) In arbitrations where there are multiple Claimants, Respondents, and/or Third-Party Respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations. Such determination will be considered subsequent to the filing of all responsive pleadings.

(3) The Director of Arbitration shall be authorized to determine preliminarily whether claims filed separately are related and shall be authorized to consolidate such claims for hearing and award purposes.

(4) Further determinations with respect to joinder, consolidation, and multiple parties under this paragraph (d)

shall be made by the arbitration panel and shall be deemed final.

[Amended eff. Oct. 1, 1984; July 1, 1986; May 10, 1989; May 7, 1991; amended by SR-NASD-98-07 eff. Mar. 16, 1998.]

10315. Designation of Time and Place of First Meeting

The Director shall determine the time and place of the first meeting of the arbitration panel and the parties, whether the first meeting is a pre-hearing conference or a hearing, and shall give notice of the time and place at least 15 business days prior to the date fixed for the first meeting by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this Rule. The arbitrators shall determine the time and place for all subsequent meetings, whether the meetings are pre-hearing conferences, hearings, or any other type of meetings, and shall give notice as the arbitrators may determine. Attendance at a meeting waives notice thereof.

[Amended eff. May 7, 1991; amended by SR-NASD-98-48 eff. Nov. 17, 1998.]

Selected Notices to Members 98-90.

10316. Representation by Counsel

All parties shall have the right to representation by counsel at any stage of the proceedings.

10317. Attendance at Hearings

The attendance or presence of all persons at hearings including witnesses shall be determined by the arbitrators. However, all parties to the arbitration and their counsel shall be entitled to attend all hearings.

IM-10317. Closing Arguments

In response to recent questions concerning the order of closing argument in arbitration proceedings conducted under the auspices of the National Association of Securities Dealers, Inc., it is the practice in these proceedings to allow claimants to proceed first in closing argument, with rebuttal argument being permitted. Claimants may reserve their entire closing for rebuttal. The hearing procedures may, however, be varied in the discretion of the arbitrators, provided all parties are allowed a full and fair opportunity to present their respective cases.

10318. Failure to Appear

If any of the parties, after due notice, fails to appear at a hearing or at any continuation of a hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be rendered as if each party had entered an appearance in the matter submitted.

[Amended eff. Jan. 8, 1992.]

10319. Adjournments

(a) The arbitrator(s) may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) Unless waived by the Director of Arbitration upon a showing of financial need, a party requesting an adjournment after arbitrators have been appointed shall deposit with the request for an adjournment, a fee equal to the initial deposit of hearing session fees for the first adjournment and twice the initial deposit of hearing session fees, not to exceed $1,000, for a second or subsequent adjournment requested by that party. If the adjournment is not granted, the deposit shall be refunded. If the adjournment is granted, the arbitrator(s) may direct the return of the adjournment fee.

(c) Upon receiving a third request consented to by all parties for an adjournment, the arbitrator(s) may dismiss the arbitration without prejudice to the Claimant filing a new arbitration.

[Amended eff. July 1, 1986; June 1, 1990; Dec. 30, 1991.]

10320. Acknowledgement of Pleadings

The arbitrators shall acknowledge to all parties present that they have read the pleadings filed by the parties.

10321. General Provisions Governing Pre-Hearing Proceedings

a) Requests for Documents and Information
The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration. Any request for documents or other information should be specific, relate to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to respond without interfering with the time set for the hearing.

(b) Document Production and Information Exchange

(1) Any party may serve a written request for information or documents ("information request") upon another party 45 calendar days or more after service of the Statement of Claim by the Director of Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration. The parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request. Such efforts shall be set forth in the objection.

(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service.

Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.

(3) Any response to objections to an information request shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt of the objection.

(4) Upon the written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this Rule or to a selected arbitrator under paragraph (e) of this Rule.

(c) Pre-Hearing Exchange

At least twenty (20) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession they intend to present at the hearing and shall identify witnesses they intend to present at the hearing. The arbitrators may exclude from the arbitration any documents not exchanged or witnesses not identified. This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.

(d) Pre-Hearing Conference

(1) Upon the written request of a party, an arbitrator, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint a person to preside. The pre-hearing conference may be held by telephone conference call. The presiding person shall seek to achieve agreement among the parties on any issue which relates to the pre-hearing process or to the hearing, including but not limited to exchange of information, exchange or production of documents, identification of witnesses,

identification and exchange of hearing documents, stipulation of facts, identification and briefing of contested issues, and any other matters which will expedite the arbitration proceedings.

(2) Any issues raised at the pre-hearing conference that are not resolved may be referred to a single member of the arbitration panel for decision.

(e) Decisions by Selected Arbitrator

The Director of Arbitration may appoint a single member of the arbitration panel to decide all unresolved issues under this Rule. In matters involving public customers, such single arbitrator shall be a public arbitrator, except that the arbitrator may be either public or industry when the public customer has requested a panel consisting of a majority from the securities industry. Such arbitrator shall be authorized to act on behalf of the panel to issue subpoenas, direct appearances of witnesses and production of documents, set deadlines for compliance, and issue any other ruling which will expedite the arbitration proceedings. Decisions under this Rule shall be made upon the papers submitted by the parties, unless the arbitrator calls a hearing. The arbitrator may elect to refer any issue under this Rule to the full panel.

[Amended eff. May 10, 1989; amended by SR-NASD-95-05 eff. Mar. 23, 1995; amended by SR-NASD-98-91 eff. Jan. 11, 1999.]

10322. Subpoenas and Power to Direct Appearances

(a) Subpoenas

The arbitrators and any counsel of record to the proceeding shall have the power of the subpoena process as provided by law. All parties shall be given a copy of a subpoena upon its issuance. Parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.

(b) Power to Direct Appearances and Production of Documents

The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member of the Association and/or the production of any records in the possession or control of such persons or members. Unless the arbitrator(s) direct otherwise, the party requesting the appearance of a person or the production of documents under this Rule shall bear all reasonable costs of such appearance and/or production.

[Amended eff. May 10, 1989.]

10323. Evidence

The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.

10324. Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings

The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

[Amended eff. Nov. 16, 1992.]

10325. Determination of Arbitrators

All rulings and determinations of the panel shall be by a majority of the arbitrators.

10326. Record of Proceedings

(a) A verbatim record by stenographic reporter or a tape recording of all arbitration hearings shall be kept. If a party or

parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.

b) A verbatim record of mediation conducted pursuant to the Rule 10400 Series shall not be kept.

[Amended eff. May 10, 1989; amended by SR-NASD-95-25 eff. Aug. 1, 1995.]

10327. Oaths of the Arbitrators and Witnesses

Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrators. All testimony shall be under oath or affirmation.

10328. Amendments

(a) After the filing of any pleadings, if a party desires to file a new or different pleading, such change must be made in writing and filed with the Director of Arbitration with sufficient additional copies for each arbitrator. The party filing a new or different pleading shall serve on all other parties, a copy of the new or different pleading in accordance with the provisions set forth in Rule 10314(b). The other parties may, within ten (10) business days from the receipt of service, file a response with all other parties and the Director of Arbitration in accordance with Rule 10314(b).

(b) After a panel has been appointed, no new or different pleading may be filed except for a responsive pleading as provided for in (a) above or with the panel's consent.

[Amended eff. Oct. 1, 1984; Apr. 26, 1991.]

10329. Reopening of Hearings

Where permitted by applicable law, the hearings may be reopened by the arbitrators on their own motion or at the discretion of the arbitrators upon application of a party at any time before the award is rendered.

10330. Awards

(a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by applicable law. Such awards may be entered as a judgement in any court of competent jurisdiction.

(b) Unless the applicable law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.

(c) The Director will serve a copy of the award on each party, or the representative of the party. The Director will serve the award by using any method available and convenient to the parties and the Director, and that is reasonably expected to cause the award to be delivered to all parties, or their counsel, on the same day. Methods the Director may use include, but are not limited to, registered or certified mail, hand delivery, and facsimile or other electronic transmission.

(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.

(e) The award shall contain the names of the parties, the name of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and other relief requested, the damages and other relief awarded, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearings, and the signatures

of the arbitrators concurring in the award.

(f) All awards and their contents shall be made publicly available.

(g) Fees and assessments imposed by the arbitrators under Rules 10205 and 10332 shall be paid immediately upon the receipt of the award by the parties. Payment of such fees shall not be deemed ratification of the award by the parties.

(h) All monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award: (1) if not paid within thirty (30) days of receipt, (2) if the award is the subject of a motion to vacate which is denied, or (3) as specified by the arbitrator(s) in the award. Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

[Amended eff. May 10, 1989; amended by SR-NASD-91-09 eff. Apr. 26, 1991; amended by SR-NASD-90-62 eff. May 7, 1991; amended by SR-NASD-91-49 eff. Jan. 2, 1992; Oct. 1, 1993; amended by SR-NASD-97-34 eff. Aug. 6, 1997; SEC Rel. No. 34-38907 (08/14/97)]

Selected Notices to Members: 93-37, 93-63, 94-54.

9600. PROCEDURES FOR EXEMPTIONS

9619. Application

a) Where to File

A member seeking exemptive relief as permitted under Rules 1021, 1070, 2210, 2320, 2340, 2520, 2710, 2720, 2810, 2850, 2851, 2860, Interpretive Material 2860-1, 3010(b)(2),3020, 3210, 3230, 3350, 8211, 8212, 8213, 11870, or 11900, Interpretive Material 2110-1, or Municipal Securities Rulemaking Board Rule G-37 shall file a written application with the appropriate department or staff of the Association and provide a copy of the application to the Office of General Counsel of NASD Regulation.

(b) Content

An application filed pursuant to this Rule shall contain the member's name and address, the name of a person associated with the member who will serve as the primary contact for the application, the Rule from which the member is seeking an exemption, and a detailed statement of the grounds for granting the exemption. If the member does not want the application or the decision on the application to be publicly available in whole or in part, the member also shall include in its application a detailed statement, including supporting facts, showing good cause for treating the application or decision as confidential in whole or in part.

(c) Applicant

A member that files an application under this Rule is referred to as "Applicant" hereinafter in the Rule 9600 Series.

[Adopted by SR-NASD-97-28 eff. Aug. 07, 1997; amended by SR-NASD-97-81 eff. Jan. 16, 1998; amended by SR-NASD-97-69 eff. August 17, 1998; amended by SR-NASD-98-57 eff. March 26, 1999; amended by SR-NASD-00-77 eff. Sept. 17, 2001.

Selected Notices to Members 98-52; 01-52.

9620. Decision

After considering an application, NASD Regulation staff shall issue a written decision setting forth its findings and conclusions. The decision shall be served on the Applicant pursuant to Rules 9132 and 9134. After the decision is served on the Applicant, the application and decision shall be publicly available unless NASD Regulation staff determines that the Applicant has shown good cause for treating the application or decision as confidential in whole or in part.

[Amended by SR-NASD-97-28 eff. Aug. 07, 1997.]

9630. Appeal

(a) Notice

An Applicant may file a written notice of appeal within 15 calendar days after service of a decision issued under Rule 9620. The notice of appeal shall be filed with the Office of General Counsel of NASD Regulation, with a copy of the notice also provided to the appropriate department or staff of the Association. The notice of appeal shall contain a brief statement of the findings and conclusions as to which exception is taken. The National Adjudicatory Council may order oral argument. If the Applicant does not want the National Adjudicatory Council's decision on the appeal to be publicly available in whole or in part, the Applicant also shall include in its notice of appeal a detailed statement, including supporting facts, showing good cause for treating the decision as confidential in whole or in part. The notice of appeal shall be signed by the Applicant.

(b) Expedited Review

Where the failure to promptly review a decision to deny a request for exemption would unduly or unfairly harm the applicant, the National Adjudicatory Council shall provide expedited review.

(c) Withdrawal of Appeal

An Applicant may withdraw its notice of appeal at any time by filing a written notice of withdrawal of appeal with the National Adjudicatory Council.

(d) Appointment of Subcommittee

Following the filing of a notice of appeal, the National Adjudicatory Council or Review Subcommittee may designate a Subcommittee to hear an oral argument, if ordered, consider any new evidence that the Applicant can show good cause for not including in its application, and recommend to the National Adjudicatory Council a disposition of all matters on appeal.

(e) Decision

After considering all matters on appeal and the Subcommittee's recommendation, the National Adjudicatory Council shall affirm, modify, or reverse the decision issued under Rule 9620. The National Adjudicatory Council shall issue a written decision setting forth its findings and conclusions and serve the decision on the Applicant. The decision shall be served pursuant to Rules 9132 and 9134. The decision shall be effective upon service and shall constitute final action of the Association.

[Amended by SR-NASD-97-28 eff. Aug. 07, 1997; amended by SR-NASD-97-81 eff. Jan. 16, 1998.]

Supreme Court, U.S.
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No. 01-868

IN THE

Supreme Court of the United States

THERESA B. BRADLEY,

Petitioner,

v.

ADAM STEPHEN DONER and DAVIS, GORDON, DONER & CHANDLER, P.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF IN OPPOSITION

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The following abbreviations will be used in this brief:

(R.__) record on appeal

(I.B.__) appellant's initial brief

(A.__) appendix to the answer brief

(App. __) appendix to the petition

REASONS FOR DENYING THE WRIT

I. The State Courts in Florida correctly applied state law on the issue of what elements were required to establish litigational legal malpractice.

A. Background:

Petitioner seeks to have this court review a decision of the intermediate appellate court in Florida which affirmed a Final Summary Judgment entered in favor of Respondents in a legal malpractice case (R. 351-56). Petitioner alleged in her Third Amended Complaint that Respondents, attorneys that represented her at different times during her prosecution of an arbitration case against Dean Witter and various brokers, committed legal malpractice (R. 135-145). She alleged that the result of the alleged malpractice was that her arbitration claim against Dean Witter was dismissed with prejudice (R. 135-45). Petitioner alleged that she had instituted her proceeding for binding arbitration against Dean Witter in October 1994 (R. 135-45). Petitioner alleged that she retained Attorney Scott Warfman to represent her in the action in October of 1996 (R. 135-145)[1]. She alleged that Attorney Warfman withdrew from the case on June 2, 1997 (R. 135-45). Petitioner alleged that she then retained Respondent, Attorney Adam Stephen Doner, on September 10, 1997 (R. 135-45). Petitioner acknowledged in the Complaint that Adam Stephen Doner withdrew from the case less than two weeks later, on September 23, 1997 (R. 135-45). She then alleges that she retained co-Respondent John William Carroll in November 1997 (R. 135-45).

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1. Mr. Warfman was originally a defendant in this case along with Respondents. However, Mr. Warfman was no longer a party to the action at the time of the motions for summary judgment.

The allegations against the attorneys were that they failed to advise Petitioner of, and respond to, Dean Witter's requests for discovery (R. 135-45). Finally, Petitioner alleged that the result of the alleged malpractice was that her arbitration proceeding was dismissed with prejudice (R. 135-45).

Discovery revealed that there were disputed issues of fact regarding whether Petitioner cooperated with her attorneys regarding the production of her 1997 and 1998 tax returns which she felt were irrelevant to the arbitration proceeding. However, discovery also revealed that the undisputed expert evidence established that the arbitration panel had exceeded its authority by dismissing Petitioner's case with prejudice without first attempting to secure compliance with the discovery requests through lesser sanctions (R. 440-46).

It was undisputed before the trial court that Dean Witter had filed two separate motions to dismiss the arbitration proceeding (I.B. 4). On September 12, 1997, Dean Witter moved to dismiss the proceeding pursuant to NASD Code of Arbitration Procedure Section 10319(c) (I.B. 4). This section permits the arbitration panel to dismiss the proceeding upon the third request for postponement. However, dismissal pursuant to this section must be without prejudice. Later, on November 11, 1997, Dean Witter moved to dismiss the arbitration proceeding pursuant to NASD code section 10305(b)(I.B. 4). This code section permits the arbitration panel to dismiss a proceeding based on failure to comply with discovery.

The arbitration panel initially dismissed Petitioner's case on January 7, 1998 (A. 1). It was not clear from that order what the basis for dismissal was. Petitioner appealed the order

dismissing her case to the Circuit Court of the Seventeenth Judicial Circuit (A. 2). Subsequent to filing her appeal to the Seventeenth Judicial Circuit, but before obtaining a ruling, Petitioner filed this lawsuit in the Fifteenth Judicial Circuit for legal malpractice on December 15, 1998 (R. 1-14). After this lawsuit was filed, the Seventeenth Judicial Circuit entered an order of remand, sending the arbitration proceeding back to the arbitration panel with instruction for them to clarify the basis upon which they dismissed the proceeding with prejudice (A. 2). Petitioner sent a letter to the Arbitration panel wherein she argued that dismissal with prejudice pursuant to Rule 10305 would be erroneous (A. 1). Nevertheless, the arbitration panel, pursuant to the order of remand, entered an "Amended Award" clarifying that the dismissal with prejudice was entered pursuant to Code of Arbitration Rule 10305(b)(A.5).

Petitioner, while simultaneously pursuing this legal malpractice case, appealed the Amended Dismissal of her arbitration case to the Seventeenth Judicial Circuit. In July, 1999, while that appeal was pending, a hearing was held in this case on Defendant's motions to dismiss the legal malpractice case. One of the points argued was that the case was not ripe because Petitioner's appeal of the arbitration panel's order of dismissal was still pending (A. 3, p.5). On July 20, 1999, Petitioner, Ms. Bradley, filed a motion in the Seventeenth Circuit Appeal to stay the proceedings or in the alternative, to take a voluntary dismissal of the appeal (R. 146-172). In the motion, Petitioner acknowledged that she was making a decision to pursue a legal malpractice claim rather than the appeal, stating:

> Plaintiff is informing the Court that she has proceeded with a Professional Negligence and

> Legal Malpractice action against Plaintiff's legal counsel which is Palm Beach County Civil Circuit Court. As the initiation of the Professional Negligence Case contains four causes of action including compensatory damages that Plaintiff would have collected against Dean Witter, compensatory damages component may essentially preclude furtherance of her meritorious appeal pending before this Court in Broward County against Dean Witter/Evansen/Schectman. However, the confusion over which award 10319c without charges or 10305 with charges remains for further judicial review.

(R. 146-172). The Seventeenth Circuit dismissed the appeal pursuant to Petitioner's voluntary dismissal.

As the legal malpractice case proceeded, Respondent retained Michael R. Casey, a legal expert in the area of securities arbitration and related appeals. Mr. Casey executed an affidavit establishing his credentials as an expert in the area of securities arbitration and related appeals (R. 354). Mr. Casey stated further that he had reviewed the pertinent pleadings from the arbitration proceeding (R. 354). Finally, Mr. Casey stated his opinion that Petitioner had abandoned a meritorious appeal, stating:

> Based on the foregoing documents and on the pertinent provisions of the NASD Code of Arbitration Procedure, the United States Arbitration Act and controlling case law authority, it is my expert opinion that the Amended Award dated February 25, 1999 in the NASD Arbitration contains sufficient quasi-judicial error such that,

> in all likelihood, it would have been vacated in the Arbitration Appeal Case had the Plaintiff therein chosen to pursue such relief in that case.

R. 440-46)

Mr. Casey also stated in his affidavit that his review of the arbitration case revealed that prior to the dismissal with prejudice the arbitration panel had not imposed any lesser sanctions on Petitioner in an effort to enforce compliance with the discovery requests which were the basis of the motion to dismiss (R. 440-46). Mr. Casey pointed out that Rule 10305(b), the rule under which Petitioner's arbitration case was dismissed, explicitly states that dismissal with prejudice can occur only if lesser sanctions have been imposed and have "proven ineffective" (R. 440-46). Co-Respondents, John Carroll, *et al.*, also obtained an affidavit from a securities expert stating that it was likely the dismissal of Petitioner's arbitration proceeding would have been reversed on appeal.

Armed with this undisputed expert testimony, Respondents each filed a motion for summary judgment based on the principle that a plaintiff cannot pursue a legal malpractice claim if the result of the alleged legal malpractice was judicial error which would likely have been corrected on appeal (A. 4). Petitioner did not file any evidence contradicting the opinion of Respondents' expert. Petitioner did not file any evidence establishing that the arbitration panel had ever imposed lesser sanctions for the discovery violations which ultimately led to the dismissal with prejudice. Petitioner took the position that the dismissal with prejudice was not an example of the arbitration panel exceeding its authority, because she had in fact failed to respond to the

discovery requests. Petitioner did not argue in any of these three responses that the arbitration panel had previously attempted to secure compliance with discovery by imposing lesser sanctions.

A hearing was held on the motions for summary judgment (R. 402-435). At the hearing, Petitioner did not submit any expert opinions contradicting Respondents' expert opinion. Petitioner did not submit any evidence suggesting that any lesser sanctions had ever been imposed by the arbitration panel before her proceeding had been dismissed with prejudice. Rather, Petitioner argued at the hearing that she believed that the failure to respond to discovery motions justified the arbitration panel's decision to dismiss with prejudice. Petitioner concluded further that there were only five basis for appealing a ruling of the NASD arbitrators "which are like fraud of the arbitrators" and Petitioner did not believe the arbitrators in her case were acting fraudulently (R. 426). However, Petitioner conceded that she was not a securities expert (R. 427), and not a lawyer (R. 432). In any event, Petitioner was not sworn in, did not testify, and did not execute or admit an affidavit.

Following the hearing, the trial judge drafted a detailed order granting the motions for summary judgment. (App. 1) Petitioner appealed that judgment to the Fourth District Court of Appeal. The Fourth District Court of Appeal affirmed the judgment based on the well-established Florida law regarding the elements of a claim for legal malpractice. (App. 8-10) Petitioner sought review before the Florida Supreme Court. The Florida Supreme Court granted petitioner numerous extensions to file a brief that complied with the applicable appellate rules. Finally, after petitioner missed each

successive deadline, the Florida Supreme Court dismissed her petition for review based on her failure to timely file a brief that complied with the rules. (App. 11)

B. The trial and appellate court correctly applied the law:

It is well established under Florida law that where a party's loss results from judicial error occasioned by the attorney's curable, nonprejudicial mistake in the conduct of the litigation, and the error would most likely have been corrected on appeal, the cause of action for legal malpractice is abandoned if a final appellate decision is not obtained. *Segall v. Segall*, 632 So. 2d 76, 78 (Fla. 3d DCA 1993). When the defendant in a legal malpractice case introduces undisputed evidence that the plaintiff has frustrated the appeal of the underlying order and thus waived the claim for legal malpractice, the defendant is entitled to a summary judgment. *Id.* Here, the undisputed evidence established that Petitioner voluntarily dismissed her appeal of the order dismissing her arbitration case with prejudice. The undisputed evidence also established that if Petitioner had pursued her appeal, in all likelihood, there would have been a reversal of the dismissal with prejudice. Accordingly, the trial court correctly held that Petitioner abandoned her claim for legal malpractice and Respondents were entitled to summary judgment and the Fourth District Court of Appeal correctly affirmed that judgment.

Florida law is absolutely clear that Petitioner is precluded from raising an issue for the first time on appeal from a summary judgment. *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981). Petitioner never argued to the trial court, in writing or at the hearing, that she had no valid appeal because

lesser sanctions for the discovery violations had been imposed against her before the arbitration panel ultimately dismissed her case. Furthermore, Petitioner did not introduce any evidence, either documentary or testimonial, establishing that lesser sanctions had previously been imposed for the discovery violations which led to the dismissal, or that it was more likely than not that she would not have prevailed on her appeal.

Finally, the June 16, 1997 order which Petitioner now refers to as the "lesser sanction" was in actuality not a sanction, but rather an order compelling discovery.

The cases relied on by Petitioner to support her argument that she did not need to pursue her appellate remedy did not involve litigational malpractice which resulted in judicial error which could be corrected on appeal. *See*, *Keramati v. Schackow*, 553 So. 2d 741 (Fla. 5th DCA 1989) (alleging negligent advice to settle case, no judicial error); *Bill Branch Chevrolet, Inc. v. Burnett, P.A.*, 555 So. 2d 455 (Fla. 2d DCA 1990) (alleging inadequate investigation of case, no judicial error); *Zitrin, M.D., P.A. v. Glaser*, 621 So. 2d 748 (Fla. 4th DCA 1993) (alleging negligent failure to include provision in employment contract, no judicial error).

The allegations in this case involve litigational malpractice and the undisputed evidence established that the resulting dismissal with prejudice was the result of judicial error which in all likelihood would have been corrected on appeal. Accordingly, the trial court correctly held that Petitioner abandoned her legal malpractice claim by failing to pursue her appeal of the order dismissing her arbitration proceeding and Respondents were therefore entitled to summary judgment.

II. Neither the record below nor the petition present a federal question that warrants review by this Court.

The rulings of the Florida courts do not raise the question presented in the first question for review asserted by Petitioner. The Florida courts did not hold that Petitioner was required to ignore the Federal Arbitration Act 9 U.S.C. §§ 1-14. The Florida courts merely applied the common law standard for recovery in a legal malpractice case and ruled that Respondents were entitled to summary judgment because the undisputed material facts established that Petitioner had failed to appeal the order dismissing her arbitration claim and that more likely than not the order would have been reversed if it had been appealed. Also, Petitioner states that the order required her to expend over $200,000 on an appellate attorney. There was no evidence before the trial court regarding how much Petitioner would be required to expend on an appellate attorney. On the contrary, the evidence before the trial court was that Petitioner was representing herself in her arbitration appeal.

Petitioner's second question presented for review is not clear and therefore is in violation of this Court's Rule 14(1)(a). As discussed above, Respondents were entitled to summary judgment based on the undisputed facts. The basis of the summary judgment was expert testimony which Petitioner did not object to before the trial court.

The third question Petitioner attempts to present does not warrant review by this court. The record clearly establishes that the ruling of the Fourth District Court of Appeal in no way denied Petitioner the due process of having her case reviewed by the Florida Supreme Court. Pursuant to the Florida Rules of Appellate Procedure, Petitioner was

entitled to seek review by the Florida Supreme Court. She sought review by the court, and indeed the court granted her numerous opportunities to file a brief that complied with the appellate rules. Petitioner failed to file a brief that complied with the rules and her case was dismissed for failure to timely file the brief. (App. 11)

The fourth question Petitioner attempts to present also does not warrant review by this Court. Petitioner has not presented any facts indicating that the State of Florida made or enforced any law treating her differently than any other citizen based on a facial classification, or that any law was applied in discriminatory manner. Indeed, the rulings of the Florida courts make it clear that all persons claiming legal malpractice based on litigational malpractice have the burden of establishing that they exhausted all appellate remedies that likely would have been successful.

The fifth question Petitioner attempts to present for review is not clear. As laid out above, the courts in Florida did not ignore the NASD Code of Arbitration Procedure.

The sixth question Petitioner attempts to present does not warrant review by this court. The courts in Florida did not ignore the common law of Florida while ruling in this case. Both the trial court and the Fourth District Court of Appeal cited the well established line of Florida cases holding that if a plaintiff alleging litigational malpractice did not pursue an appellate remedy which had a likelihood of correcting the error, they may not pursue a legal malpractice claim.

The seventh question petitioner attempts to present does not warrant review by this court. The rulings of the trial and

appellate court in this case make it clear that the courts were not modifying the Federal Arbitration Act by requiring an appeal of the ruling of the arbitration panel. The courts were merely applying the state common law of Florida which requires that viable appellate remedies must be exhausted before a litigant can pursue a malpractice claim against their lawyer based on litigational malpractice.

CONCLUSION

Petitioner has not presented a question which warrants review by this Court. The record clearly establishes that the trial and appellate court in Florida merely applied the well established state common law regarding litigational legal malpractice claims. The questions Petitioner attempts to present for review are not clear. Furthermore, the questions presented for review incorrectly assume that the Florida trial and appellate court rulings addressed issues which they did not address expressly or inherently. Finally, Petitioner's assertion that this case presents an equal protection or due process question is without merit. Petitioner asserts that there is an equal protection question, but she does not state any facts suggesting that she has been treated differently based on a classification or that the law in Florida regarding litigational malpractice was applied to her in a discriminatory manner. Petitioner asserts that her due process right to review by the Florida Supreme Court was hindered by the Fourth District Court of Appeal. However, the record clearly establishes that the sole reason the Florida Supreme Court dismissed Petitioner's case was her failure to timely file a brief which complied with Florida Rules of Appellate Procedure 9.210(a)(2). 9.210(b) and 9.210(d). For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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